

COPYRIGHT ROYALTY TRIBUNAL

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:
PUBLIC BROADCASTING RATES PROCEEDINGS :
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Postal Rate Commission
2000 L Street, N.W.
Room 500
Washington, D. C.

Thursday, May 4, 1978

The hearing in the above-entitled matter
commenced at 10:00 a.m., before:

COMMISSIONER THOMAS C. BRENNAN, Chairman

COMMISSIONER DOUGLAS E. COULTER

COMMISSIONER MARY LOU BURG

COMMISSIONER CLARENCE L. JAMES, Jr.

COMMISSIONER FRANCES GARCIA

ORIGINAL

PRESENT:

ALAN LATMAN, Attorney-at-Law
ERIC SMITH, Attorney-at-Law
475 Le Enfant Plaza, S.W.
Washington, D. C.
Counsel for PBS

I. FRED KOENIGSBERG, Attorney-at-Law
One Lincoln Plaza
New York, New York 10023
Counsel for ASCAP

ALSO PRESENT:

Mr. Benjamin Zelenko

Mr. Eugene N. Aleinikoff

P R O C E E D I N G S

CHAIRMAN BRENNAN: The meeting will come to order.

The Tribunal is meeting this morning to consider rates and terms for the use of certain copyrighted works by non-commercial broadcasting. The notice of this meeting appeared in the Federal Register of Thursday, April 27 and I direct that the notice be inserted at this point in the record.

(See insert.)

sunshine act meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409), 5 U.S.C. 552b(e)(3).

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[6351-01]

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: 10 a.m., May 2, 1978.

PLACE: 2033 K Street NW., Washington, D.C., 5th floor hearing room.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Portions open to the public.

Part 8—Disciplinary rules and proposed rules relating to exchange procedures for disciplinary, summary and membership denial actions.

Portions closed to the public:

Enforcement matter and offer of settlement.

CONTACT PERSON FOR MORE INFORMATION:

Jane Stuckey, 254-6314.

[S-881-78 Filed 4-25-78; 10:49 am]

[6351-01]

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: 11 a.m., May 5, 1978.

PLACE: 8th Floor Conference Room, 2033 K Street NW., Washington, D.C.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Market Surveillance.

CONTACT PERSON FOR MORE INFORMATION:

Jane Stuckey, 254-6314.

[S-882-78 Filed 4-25-78; 10:49 am]

[1410-01]

COPYRIGHT ROYALTY TRIBUNAL.

TIME AND DATE: 10 a.m. and 2 p.m., Thursday, May 4, 1978.

PLACE: Room 500, 2000 L Street NW.

STATUS: Open.

SUBJECT: Consideration of terms and rates of royalty payments for the use of certain works in connection with noncommercial broadcasting.

CONTACT PERSON FOR MORE INFORMATION:

Thomas C. Brennan, Chairman,
Copyright Royalty Tribunal, 202-653-5175.

THOMAS C. BRENNAN,
Copyright Royalty Tribunal.
[S-878-78 Filed 4-25-78; 9:06 am]

[6570-06]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 43 FR 17112, April 21, 1978.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 9:30 a.m. (eastern time), Tuesday, April 25, 1978.

CHANGES IN THE MEETING: The time of the meeting is changed to 11:30 a.m. (eastern time), and the entire meeting will be open to the public.

Litigation matters previously announced for consideration at a closed session will be taken up at a later meeting. A majority of the entire membership of the Commission determined by recorded vote that the business of the Commission required these changes and that no earlier announcement was possible.

The vote was as follows:

In favor of change.—Eleanor Holmes Norton, Chair; Daniel E. Leach, Vice Chair; and Ethel Bent Walsh, Commissioner.
Opposed.—None.

CONTACT PERSON FOR MORE INFORMATION:

Marie D. Wilson, Executive Officer,
Executive Secretariat at 202-634-6748.

[S-880-78 Filed 4-25-78; 9:42 am]

[6730-01]

FEDERAL MARITIME COMMISSION.

TIME AND DATE: 10 a.m., May 3, 1978.

PLACE: Room 12126, 1100 L Street NW., Washington, D.C. 20573.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Agreements Nos. 2846-30 and 2846DR-5: Modifications of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference's basic agreement and dual rate contract system to extend authority for independent action.

2. Special Docket Nos. 460 and 461: *U.S. Department of Agriculture v. Waterman Steamship Corporation*—Review of initial decision.

3. Special Docket No. 554: *Hermann Ludwig, Inc. v. Waterman Steamship Corporation*—Review of initial decision.

4. Special Docket No. 546: *United Grocery Export Co. v. Pacific Westbound Conference*—Review of initial decision.

5. Special Docket No. 560: *American Home Foods v. Sea-Land Service*—Review of initial decision.

6. Special Docket No. 571: *Firestone International v. United States Lines, Inc.*—Review of initial decision.

CONTACT PERSON FOR MORE INFORMATION:

Francis C. Hurney, Secretary, 202-523-5725.

[S-879-78 Filed 4-25-78; 9:06 am]

[7035-01]

INTERSTATE COMMERCE COMMISSION.

TIME AND DATE: 1:30 p.m., Tuesday, May 2, 1978.

PLACE: Room 4225, Interstate Commerce Commission Building, 12th Street and Constitution Avenue NW., Washington, D.C.

1 This body has not yet adopted its permanent rules
2 of procedure. Therefore, at the start of this proceeding,
3 it was necessary for the Tribunal to adopt temporary rules of
4 procedure governing the portion of the proceeding during
5 which we received testimony from the parties. Likewise, today
6 it is necessary to establish procedures for this portion of the
7 proceeding; specifically, the offering of motions by com-
missioners and voting on motions.

8 Since the first meeting of the Tribunal, a custom
9 has developed whereby commissioners have seconded motions
10 made by colleagues. There is certainly no objection to a
11 commissioner seconding a motion as an indication of support
12 for the motion. However, the Chair wishes to indicate that
13 in the judgement of the Chair, a second is not required and
14 consequently the Chair will not deny a commissioner the right
15 to have a vote on a motion in the event that a second is not
forthcoming.

16 Concerning voting on motions the Chair, unless
17 otherwise directed, will be guided by the draft language of
18 the rules of procedure. The relevant language concerning
19 voting reads as follows:

20 "In all matters in which a vote is required, each
21 individual commissioner's vote shall be recorded separately.
22 The recorded vote of the commissioners shall be taken in
23 order of their seniority, except that the Chairman shall vote
last. There shall be no proxy voting."

24 We are glad to have counsel for the parties present
25 as our guests this morning, but the Chair must observe that at

1 this stage in the proceedings counsel have no rights to take
2 part in the proceedings unless they are requested to do so by
3 the body.

4 The Tribunal has received a letter from Mr. Alan
5 Latman, dated April 20. In this letter, Mr. Latman alleges
6 that the ASCAP post hearing reply statement is in flagrant
7 disregard of the rules of procedure of this proceeding. I
8 direct that Mr. Latman's letter be inserted at this point in
9 the record.

10 (See insert.)
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24 APR REC'D

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AREA CODE 212
YUKON 6-6272

CABLE ADDRESS:
COWLIELAT, N. Y.

April 20, 1978

Honorable Thomas C. Brennan
Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
Washington, D.C. 20036

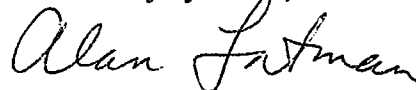
Dear Mr. Chairman:

We are reluctant to write this letter but are required to do so because of our view that the ASCAP Post-Hearing Reply Statement is in flagrant disregard of the rules established at the hearing.

It will be recalled that the genesis of the reply statements was the request of ASCAP that the parties be permitted to comment on new proposals and new facts presented in the post-hearing statements of appearing parties. It was clear that this opportunity should not be used to submit new data. Accordingly, we carefully refrained from doing so in our Supplementary Post-Hearing Statement, restricting it to comments on the post-hearing statements of National Music Publishers Association, Inc. and ASCAP. ASCAP, on the other hand, in its 38 page "reply", submitted new material by way of newspaper articles and its own new disclosures.

We are prevented from responding by ASCAP's use of the reply opportunity at the close of the record to introduce new material, but we deem it necessary to make our position clear on this matter. Of course, if the Tribunal wishes our comments on this new material at this time, we would be happy to furnish them.

Sincerely yours,



Alan Latman

AL/mc

cc: Commissioner Mary Lou Burg
Commissioner Douglas E. Coulter
Commissioner Frances Garcia
Commissioner Clarence L. James, Jr.
Bernard Korman, Esq.
Mr. Leonard Feist

1 On March 14, Mr. Korman, counsel for ASCAP, pro-
2 posed that the rules governing this proceeding be modified
3 to require the parties to submit their complete statements
4 one week prior to the deadline for filing statements so that
5 in the event there were new disclosures in those statements
6 other parties would have the opportunity to comment on those
disclosures.

7 Mr. Latman suggested that Mr. Korman's proposal
8 be modified to require only changes in proposals be submitted
9 on the earlier date. Mr. Korman objected to Mr. Latman's
10 proposed modification and Mr. Latman then withdrew his ob-
11 jection and indicated that he had no objection to Mr. Korman's
proposal.

12 The rules were therefore modified as suggested by
13 Mr. Korman. The Chair has examined the ASCAP post hearing
14 reply statement and, in the opinion of the Chair, Mr. Latman's
15 objection is well taken.

16 In the opinion of the Chair, portions of the
17 ASCAP post hearing reply statement are not in compliance with
18 the rules of this proceeding and should therefore be stricken
19 from this record.

20 The Chair does not believe that it would serve a
21 useful purpose today to segment the admissible portions of
22 the ASCAP post hearing reply statement. In this connection,
23 the Chair notes that certain of the items which would likely
24 be stricken involve subject matter that one or more com-
missioners have raised previously in this proceeding and which
25 might well be pursued by commissioners during today's

1 proceedings.

2 Before proceeding to the consideration of a
3 specific text of the schedule of rates and proposed regulations,
4 it would be useful, I believe, for the commissioners to engage
5 in a general discussion of the issues which have arisen
6 during these proceedings and perhaps the most useful place to
7 begin would be by considering what mandate we have been given
8 by the Congress.

9 In my opinion, speaking as an individual com-
10 missioner now, there is clear guidance in the reports of the
11 House and Senate committees as to the policy objectives to be
12 pursued in our decisions. One of the first issues to be
13 considered is the standard to be applied in determining the
14 rate schedule.

15 I believe, from my examination of the committee
16 records and the proceedings in the Congress, that it was the
17 intent of the Congress that this body should adopt a rate
18 schedule which would provide reasonable compensation to the
19 owners of copyright materials and that compensation should be
20 based on the fair value of the materials used.

21 I also believe that it is clear from the committee
22 reports that it was not the intent of the Congress that the
23 owners of copyrighted materials should subsidize the operations
24 of public broadcasting with regard to the use of copyrighted
25 materials.

26 I would now invite any of my colleagues who wish
27 to comment on these policy issues to now take the floor.

28 (No comments.)

1 I gather from the lack of request for recognition
2 that at least up to this point a consensus is developing.

3 The proceedings in the Congress further require
4 this body to consider the general public interest in
5 encouraging the growth and development of public broadcasting.
6 We must, therefore, ponder whether the adoption of a rate
7 schedule which is based on the fair value of the materials
8 being utilized would have any significant impact on the
9 development of public broadcasting.

10 Speaking again, as an individual commissioner, it is
11 my view that no schedule which this body is likely to adopt
12 will have any significant impact on the growth of public
13 broadcasting. But, let me address myself to what I think is
14 a hypothetical question. Namely, if this body were to deter-
15 mine that the fair value of the materials being used by public
16 broadcasting required payments beyond the current ability of
17 public broadcasting to pay without some impact on their
18 activities, what should be our disposition of that matter.

19 In my opinion, and I emphasize again that I'm
20 making these comments only to deal with what I think is a very
21 hypothetical situation, it would still be the responsibility
22 of this agency to adopt a schedule according to the fair
23 value standard. And, if our actions, at some time did have
24 an impact on public broadcasting's activities, the remedy
25 would be elsewhere, perhaps in the Congress.

Again, I invite commissioners who wish to comment
to take the floor.

(No comments.)

1 If not, we will go on to consider various issues
2 which have arisen in the course of this proceeding.

3 Prior to the start of the hearings, commissioners
4 anticipated that testimony might be offered concerning offers
5 that were discussed in private discussions, either before or
6 after the Copyright Act was enacted. It was the intention of
7 commissioners to exclude such evidence from these proceedings.

8 That was our intention because we felt, in several
9 sections of the Copyright Act, the intent of Congress was to
10 encourage voluntary agreements and that, if this body were to
11 establish the precedent of admitting evidence concerning
12 such offers, it could well frustrate efforts at voluntary
13 agreement in the future.

14 It became apparent, however, that this was a classic
15 case of locking the barn door after the horse had escaped. It
16 was obvious that no useful purpose would have been served
17 by preventing testimony on the question of offers that were
18 made in private discussions. Therefore, when this issue arose
19 during the proceedings, the Chair, after consultation with
20 commissioners, ruled that we would admit testimony concerning
21 private offers in this proceeding, but that we would determine
22 later what weight would be given to that testimony.

23 In my opinion, as an individual commissioner, for
24 the reasons that the commissioners previously discussed,
25 no consideration should be given in the determination of our
rate schedule to offers that were made in private discussions.

Again, I invite commissioners who desire to
comment on this point.

1 COMMISSIONER COULTER: You are talking now about
2 the offers, not agreements?

3 CHAIRMAN BRENNAN: That's correct, commissioner,
4 but you have provided a nice bridge, commissioner, to the
5 next logical question, which is namely, what weight we wish
6 to give to the three voluntary agreements.

7 In the interest of all the procedure, I would
8 suggest that, at this stage in the proceeding, that we focus
9 on performing rights for musical works and consider what
10 value the three agreements have in determining that issue. It
11 is my opinion, as an individual commissioner, that voluntary
12 agreements are of almost no value to us in making our
13 determinations. I see no connection between the Harry Fox
14 agreement and the determination of the fair value of per-
15 formance fees in musical works.

16 As to the SESAC agreement, much of the dispute
17 concerning the proper interpretations of the SESAC agreement
18 has become moot in light of developments since the hearings
19 were concluded.

20 If we were to accept the ASCAP and SESAC inter-
21 pretations of the SESAC agreement, it could possibly be
22 argued that the SESAC agreement would lend some weight to the
23 approach taken in the ASCAP proposal, but clearly that inter-
24 pretation would be disputed by public broadcasting.

25 As to the BMI proposal, I find it unnecessary to
speculate concerning the motivations of BMI. I will leave
it to ASCAP to analyze BMI, but we should note that BMI
declined the opportunity to take part in these proceedings,

1 declined the opportunity to explain the terms of the voluntary
2 agreement, or to answer questions from commissioners concerning
3 those terms.

4 And, finally, because of the adjustment clause,
5 I have concluded that I do not believe that the BMI agreement
6 is of much value to me in my decision-making process.

7 Are there comments from commissioners?

8 COMMISSIONER COULTER: Yes. I can't say I
9 necessarily disagree with you as far as the Harry Fox agree-
10 ment is concerned, but the SESAC agreement, in my opinion,
11 was something reached by both Public Broadcasting and SESAC
12 and at the same time has some relationship with the market-
13 place because, at least according to SESAC, they made their
14 basic calculations on what they would charge if the public
15 broadcasting stations were commercial. Exactly how they
16 did that and what they did, we don't know, but nevertheless,
17 they claimed to have done that. So, I'm afraid I don't think
18 it's totally irrelevant as some kind of guide.

19 That doesn't mean I'm necessarily endorsing it,
20 but I wouldn't want to exclude it, and with the compromise as
21 possibly an objective to some stage, I don't think it nec-
22 cessarily tilts any structure towards ASCAP, in particular,
23 or towards PBS in particular.

24 So, I would respectfully like to suggest that I
25 wouldn't rule it out as a guide. I agree with you, however,
on the BMI, that it's a little hard to find in their agree-
ment much basis for a judgement.

CHAIRMAN BRENNAN: I certainly agree with my

1 colleague that if it was clear from our record that both SESAC
2 and Public Broadcasting approached their agreement somewhat
3 along the lines of deciding what the SESAC rates would be, if
4 applied to commercial broadcasting, and then discounting that
5 fee, in that situation, I would agree with my colleague that
6 the SESAC agreement might well be of some value. But, I fear
7 that the record as to exactly what was done is not quite so
8 clear.

8 COMMISSIONER JAMES: I somewhat support Commissioner
9 Coulter's analysis of it. You have the sworn testimony of the
10 principal negotiator that said this is how it was arrived at
11 and that sworn testimony has to be given some weight. It was
12 not controverted by Public Broadcasting, from my review of
13 the record, so I think it does have some appropriate force.

14 As far as a final determination as to how we are
15 going to arrive at a rate, it was fairly negotiated except
16 for the per composition thing which is somewhat disputed.
17 I think Commissioner Coulter's point is well taken that we
18 just cannot ignore that of all three agreements, this one
19 probably has the most appropriate weight if we were to be
20 considering any.

21 CHAIRMAN BRENNAN: I certainly agree again with
22 my colleague that if that interpretation were, in fact,
23 accepted by Public Broadcasting, that it would certainly, in
24 my opinion, carry some weight, but I think that the jury is
25 still out on that point.

COMMISSIONER JAMES: We're the jury.

CHAIRMAN BRENNAN: Yes.

1 COMMISSIONER COULTER: At one point, Public
2 Broadcasting did accept it since it is an agreement.

3 COMMISSIONER JAMES: They signed it.

4 CHAIRMAN BRENNAN: They accepted the agreement,
5 but -- would any commissioners be interested in the chairman
6 asking Public Broadcasting to comment on this matter, since
7 it seems to be of some interest to the commissioners?

8 COMMISSIONER COULTER: Does that cause any pro-
9 cedural difficulties?

10 CHAIRMAN BRENNAN: No, it would not. The chair
11 would ask that one of the gentlemen from Public Broadcasting
12 who have heard this exchange among commissioners if they
13 would care to give us the benefit of their interpretation.

14 COMMISSIONER BURG: Excuse me one moment, Mr.
15 Chairman. Is there someone from SESAC in the audience?

16 CHAIRMAN BRENNAN: No, but they were notified,
17 commissioner, and the counsel is in Venice.

18 MR. ALEINIKOFF: I would be very happy to be of
19 help, but I'm not quite sure what the question is. I don't
20 think you want a detailed history of the SESAC exchange.

21 CHAIRMAN BRENNAN: We are not concerned, Mr.
22 Aleinikoff, with the terms of the agreement. The current
23 discussion focuses on the extent, if any, to which Public
24 Broadcasting entered into that agreement in terms of accepting
25 an approach whereby SESAC would determine what its rates
would have been if this were a commercial venture and then
discounting that rate to take into account the more limited
resources.

1 COMMISSIONER COULTER: May I interrupt at this
2 point. That wasn't quite the point I was making. They
3 arrived at the sum, the contract, by two entirely different
4 approaches.

5 CHAIRMAN BRENNAN: That's true.

6 COMMISSIONER COULTER: So, how Public Broadcasting
7 conceived or perceived SESAC's approach, at least from my
8 opinion, is I don't feel argues against my feeling of SESAC's
9 approach agreement was relevant. In other words, how they
10 arrived at their agreement or how Public Broadcasting per-
11 ceived the SESAC agreement is not necessarily vital, as far as
12 I'm concerned.

13 CHAIRMAN BRENNAN: If my colleague will indulge me,
14 I'd still like to ask the same question as to invite Public
15 Broadcasting to comment on whether they perceive the SESAC
16 agreement as following this approach whereby SESAC determined
17 what the rates would have been if this were a commercial
18 venture and then discounting the rates.

19 MR. ALEINIKOFF: Let me --

20 CHAIRMAN BRENNAN: Let the record indicate that
21 Mr. Aleinikoff is responding.

22 MR. ALEINIKOFF: I think I had better take a few
23 minutes to explain what our approach was. Our approach was
24 that we were interested in making an agreement with SESAC as
25 with all of the other agencies. We were negotiating simul-
taneously with all four of these and maybe others in other
segments.

Our approach has always been to try and reach an

1 agreement that makes sense from our point of view.

2 In answer to your question, our offers in the
3 course of negotiations were based upon what we thought was a
4 fair overall deal which included both the blanket amount and
5 the per piece uses that went with it.

6 I have never been clear, and I guess I was the
7 chief negotiator for Public Broadcasting, I have never been
8 clear at why SESAC established its amount. I did not under-
9 stand that to be due to a formula of commercial uses with or
10 without a discount. Actually, there was some other standard
11 that SESAC mentioned at the time, but I didn't believe that
12 I had the right to ask what was the basis for their under-
13 standing, nor did they tell me very clearly, nor did they
14 ask us what was the basis for ours.

15 We both sought to obtain an amount that would make
16 sense to each of us in terms of what they thought was the
17 fair value and what we thought was a fair value in terms of
18 public broadcasting. Does that answer your question?

19 CHAIRMAN BRENNAN: Thank you. You have answered
20 my question. Commissioner Coulter may have a question of
21 his own.

22 COMMISSIONER BURG: I have one.

23 CHAIRMAN BRENNAN: Commissioner Burg has one.

24 COMMISSIONER BURG: Mr. Aleinikoff, at one point
25 in the record, Mr. Ciancimino said with respect to your
negotiations that at one point they came in with a higher
dollar figure and you came in with a lower one and subsequent-
ly it was resolved and negotiated to the \$50,000 figure. Is

1 it proper, Mr. Chairman, to ask what that higher figure and
2 what that lower figure was? Is that violating some --

3 CHAIRMAN BRENNAN: We have established the precedent
4 for taking testimony in this area and then deciding to exclude
5 the value of the testimony, but you are certainly within your
6 rights in asking the question.

7 COMMISSIONER BURG: Do you recall those two figures,
8 Mr. Aleinikoff?

9 MR. ALEINIKOFF: May I say more than just the two
10 figures, because I'd like to explain, but on the other hand
11 I don't want to present a one sided version of what occurred.
12 That's really not fair to SESAC or to anybody else. I'll
13 just try and say as accurately as I can how it happened.

14 The actual arrangement that was made, as happens
15 in all these where you finally reach a point where you reach
16 a deal or not, as I remember it, and I hope you will ask Mr.
17 Ciancimino if he remembers it, he asked me what was the
18 maximum that we would pay. I said the maximum was -- I thought
19 it over -- was \$50,000 and he said okay.

20 Now, where that had arrived from was he had at one
21 time talked about ten percent of the total going to SESAC.
22 He calculated, and I really do think that this is -- it may
23 be argumentative on our behalf, and I hope you will check it
24 with him -- he calculated that the total, he said, would come
25 to some place around \$750,000 so that he asked for ten percent
based upon previous formulas and previous negotiations with
SESAC which came to \$75,000.

In answer to your question, our original offer, I

1 believe, was 20 or 25 some place. I think it was \$25,000 as
2 being the maximum that we felt we could pay as a minimum
3 guarantee against the per use figures. Maybe it was the 75 or
4 25 that got us to the 50. I don't know. I can only tell you
5 what I remember happening.

6 It seems to be lots of questions about remembrances
7 in this area, so you may want to talk to others who were
8 there.

9 CHAIRMAN BRENNAN: Thank you. Are there any
10 further comments on the voluntary agreements?

11 COMMISSIONER GARCIA: Mr. Chairman.

12 CHAIRMAN BRENNAN: Commissioner Garcia.

13 COMMISSIONER GARCIA: If I recall the testimony
14 given by the SESAC counsel, he did go into detail as to how
15 he had arrived at the \$50,000 and I think, at the time, it
16 was made clear in the record that both their thinking and PBS'
17 thinking as to the rationale in arriving at that \$50,000 was
18 different, but since he felt that he had arrived at that
19 \$50,000 using a formula which they had originally anticipated
20 in using their negotiations with Public Broadcasting that that
21 was the reason that he settled on the \$50,000.

22 I guess my reason for bringing this up, after
23 hearing both comments from Public Broadcasting and Commissioner
24 Coulter, I think that there may be some merits in Commissioner
25 Coulter's comments that we possibly should not ignore com-
pletely the formula and rationale used by SESAC in arriving at
that \$50,000.

CHAIRMAN BRENNAN: Thank you Commissioner, and

1 having opened this discussion, let me perhaps close it by
2 responding to some of these points.

3 I said in my initial intervention that if we were
4 to accept the interpretation given to the testimony by ASCAP
5 and SESAC, then in my judgement, the SESAC agreement could well
6 be of some value to us in approaching the ASCAP proposal.
7 But, Mr. Aleinikoff's answer to my question, in my view, leaves
8 me where I was at the start of this intervention; namely,
9 that there is a difference of opinion as to how that formula
10 was reached and I certainly don't intend to totally exclude
11 any considerations of the approach in the SESAC agreement.
12 But, I think it ought to be considered in terms of the dif-
13 ferences in opinion that exist as to how it was formulated.

14 Commissioner Coulter.

15 COMMISSIONER COULTER: Mr. Chairman, if I may just
16 get in my two cents worth, the difference of agreement in the
17 interpretation of how the formula was reached, and given the
18 fact that there was an agreement may, in fact, make that
19 agreement even more appropriate because the differences of
20 agreement is, of course, is what the whole proceeding is about.

21 I phrase that awkwardly, but I mean the fact that
22 there was a disagreement in interpretation on how the formula
23 was arrived at does not necessarily, in my opinion, validate
24 the agreement.

25 CHAIRMAN BRENNAN: If there is no further discussion
on the voluntary agreements, we can go on to another issue
and it might be well at this point to consider the general
subject of individual licenses for public broadcasting entities.

1 As I understand the ASCAP position, it is that in
2 their judgement the Copyright Act mandates that this body must
3 adopt a structure which would individually license each public
4 broadcasting entity. I have found, in reading the testimony
5 and examining the briefs that there seems to be some confusion
6 about terminology. Possibly this may be the result of the
7 conversion from the voluntary discussions where the focus was
8 in terms of trying to agree upon a license to the proceedings
9 in this body where, as I read the statute, there is no
10 reference to license agreements.

11 Of all the comments on this issue, the one which
12 I found to be the most useful appears in the April 11 state-
13 ment of the National Music Publishers Association which reads
14 in part: "We believe, therefore, that the Tribunal should con-
15 clude that the adoption of any form of license is unnecessary
16 and inappropriate."

17 Turning to the Copyright Act, in Section 118(b)(2)
18 which deals with voluntary agreements, you do find references
19 to "license agreements" but in the following subsection (3),
20 which deals with the proceedings before this body, in the
21 absence of voluntary agreement, there is no reference to
22 licenses.

23 In my opinion, a license is permission to do some-
24 thing and that permission has been granted by the Congress in
25 passing Section 118, subject to the reasonable rates and
terms that this body may establish. Consequently, I am not
at all sympathetic to arguments that this body is required by
the statute to license or provide for the licensing of every

1 public broadcasting entity.

2 I think the license terminology is actually in-
3 appropriate to our proceedings. I again invite commissioners
4 to comment if they desire.

5 (No comments.)

6 If this body determines that the Copyright Act
7 does not mandate a separate license for every public broad-
8 casting entity, there remains the issue of whether, in our
9 discretion, it is our desire to do so based on the arguments
made to us by ASCAP.

10 Commissioner Coulter pursued this issue at the end
11 of the hearings. I thought that commissioner pursued the
12 question very effectively and very thoroughly. I did not
13 find the answers from the ASCAP witness to be very persuasive,
14 nor did I find the arguments advanced in their post-hearing
15 statement to be persuasive. Consequently, I have no intention
to support a structure which involves individual licenses.

16 COMMISSIONER JAMES: One question, Tom. You are
17 not saying that each individual broadcasting entity is not
18 subject to a term of a rate?

19 CHAIRMAN BRENNAN: No.

20 COMMISSIONER JAMES: Okay. Whether or not a license
21 is granted, each individual station is subject to any terms
that we set in them?

22 CHAIRMAN BRENNAN: Yes. I will come to that again
23 later when we discuss the particular formula of the rate
24 structure. I'm dealing, at this point, only with the legal
25 question raised by ASCAP and the terminology question as to

1 whether or not there has to be a license, a piece of paper.

2 COMMISSIONER JAMES: In the broad legal sense of
3 what a license is --

4 CHAIRMAN BRENNAN: That's correct.

5 The next issue that we might usefully consider is
6 the request made by ASCAP that our findings in this pro-
7 ceeding: "State explicitly that it intends no precedential
8 effect for this initial determination."

9 I assume that the motivation for this proposal
10 is a concern that between now and some future date, significant
11 changes may occur in the structure of public broadcasting and
12 what we decided in the next few weeks on this issue might not
13 be of valid precedent in the event of that change in the
14 structure of public broadcasting.

15 I would certainly agree that if you do have signi-
16 ficant changes in public broadcasting between now and the
17 next proceeding before this body, that what we decide in this
18 month would be of limited value as a precedent.

19 On the other hand, if the basic situation remains
20 unchanged, then in my opinion, what we decide in this pro-
21 ceeding should be given some weight in future proceedings.

22 I don't think we need to affirmatively state in
23 our findings that what we are deciding is covered with great
24 weight, but on the other hand I'm not prepared to include in
25 our decision a statement that what we decide should have no
value in the future as a precedent.

I'm focusing now solely in terms of musical works.
Later in the day I will talk about some of the problems with

1 variable works and the paucity of data currently available to
2 this body.

3 Are there any comments from commissioners on this
4 point?

5 COMMISSIONER JAMES: I have a couple. All of us
6 are under the gun to get this hearing under way. I think re-
7 gardless of whether or not there is a great fluctuation in what
8 public broadcasting is doing, the environment under which we
9 are now promulgating these rules could have substantially
10 changed in another five years.

11 I think ASCAP's point is well taken because I
12 think we do a disservice to public broadcasting and the owners
13 of copyright if we are going to be so bound by what we do
14 today when we are operating under ad hoc interim rules, et
15 cetera, that we would not want to ascribe to at all in the
16 future or would not want to explore maybe more fully. They
17 may want to have a year of hearings. Who knows.

18 So, I think the point is well taken, Mr. Chairman,
19 that I don't think we want to bind, and I think we owe it to
20 Public Broadcasting and ASCAP to make some indication that this
21 is not something that is going to be cast in, that there is
22 going to be flexibility in the future, and that they are not
23 locked into what happens now. I feel strongly about it.

24 CHAIRMAN BRENNAN: That really is not the request
25 made by ASCAP. ASCAP is requesting that we make an affirm-
ative statement in our findings.

COMMISSIONER JAMES: I'm willing to make an

1 affirmative statement.

2 COMMISSIONER COULTER: Commissioner James, simply
3 leaving the point silent, wouldn't that be sufficient?
4 Wouldn't that state that it is neither casting the concept
5 in nor excluding the possibility that it be useful in the
6 future if there is no explicit statement made?

7 COMMISSIONER JAMES: If there is no statement
8 made, it is like it never happened, but there can be a request
9 that it be made and I don't see what the objection -- I don't
10 see any objection to making any statement.

11 COMMISSIONER COULTER: I would think the whole
12 concept of reviewing the rates and terms periodically suc-
13 ceeds in guaranteeing that nothing will be cast in and there
14 is no need to have --

15 COMMISSIONER JAMES: This is going one step beyond
16 to make it, as your friend used to say, perfectly clear.

17 COMMISSIONER BURG: I think the statute, by virtue
18 of the fact that it opens it up for review in five years
19 really takes care of it. If obviously some dislocations have
20 occurred during the initial five year rate structure, I'm
21 sure that one or both parties will bring that to the attention
22 of the Tribunal at the appropriate time.

23 COMMISSIONER GARCIA: Mr. Chairman, in your
24 experience, is it customary in rendering opinions to
25 specifically state the request here that ASCAP has made of us?

CHAIRMAN BRENNAN: Yes. It certainly is not
lacking in precedent and I would not be surprised, at least
in portions of our discussion of visual works, that we might

1 come close to a statement of this nature, but I don't see a
2 need for it based upon this record with regard to musical
3 works.

4 I agree with Commissioner Burg that if you have
5 more changes in the structure of public broadcasting that
6 obviously would delete the value of this decision as a
7 precedent in our future deliberations.

8 All I'm saying at this time , at this stage, is
9 I don't see a need for an affirmative statement to be made
10 in our findings.

11 COMMISSIONER GARCIA: Let me ask another question.
12 Are we under the gun in getting both the Tribunal and ASCAP
13 and PBS--should any weight be given to that, in your opinion?

14 CHAIRMAN BRENNAN: I think not. You are talking
15 about being under the gun. The parties have been discussing
16 rates and terms for several years and it is almost impossible
17 to imagine anything else that could have been brought before
18 us in these proceedings even given a longer time frame.

19 COMMISSIONER JAMES: I'd like to hear -- ASCAP
20 has made this proposal. I'd like to hear what Public
21 Broadcasting -- what their comments are. If they both agree
22 to it would there be an objection to inclusion?

23 MR. ALEINIKOFF: I would only like to say that this
24 is not --

25 CHAIRMAN BRENNAN: Just to avoid having to do this,
whenever we ask counsel to respond, would you please identify
yourselves so that the Reporter will know who is speaking.
Mr. Aleinikoff.

1 MR. ALEINIKOFF: Mr. Chairman, may I just say that
2 I'm not counsel. Am I still permitted to speak?

3 CHAIRMAN BRENNAN: Yes.

4 MR. ALEINIKOFF: I'm director of the project and
5 Mr. Latman and Mr. Smith are counsel.

6 CHAIRMAN BRENNAN: Yes. We have that duly recorded
7 in our record.

8 MR. ALEINIKOFF: All I can say is for the projects
9 we have not considered this point in our deliberations and I
10 really do hesitate to give you any indication of where we
11 stand on this. I would like a chance to think about it for
12 a few minutes or an hour or some time and then give you an
13 answer if I possibly can. I don't think we answered this at
14 anytime during the hearings and I don't think --

15 CHAIRMAN BRENNAN: When you indicate you would
16 like to have more time, are you thinking in terms of a brief
17 conference with your colleagues or are you thinking in terms
18 of supplying a letter to us some time next week?

19 MR. ALEINIKOFF: We really have run out of letters.
20 We would like to think in terms of a very brief discussion
21 with my colleagues.

22 CHAIRMAN BRENNAN: Commissioner James reminds me
23 that we have had -- talking about precedents -- a precedent
24 to recess briefly around eleven o'clock. So, we will recess
25 for a few minutes.

(A brief recess was held.)

CHAIRMAN BRENNAN: The meeting will resume.

Mr. Aleinikoff, do you wish to respond?

1 MR. ALEINIKOFF: May I turn to counsel, since this
2 is a matter of position?

3 CHAIRMAN BRENNAN: We will be glad to hear from
4 Mr. Latman.

5 MR. LATMAN: Thank you. We, or whoever our
6 successors would be in five years, would certainly try to
7 present whatever facts are then pertinent as completely as
8 possible and if there are changes we assume that they will
9 be properly called before the Tribunal by all parties concerned.

10 On the precise question about what the Tribunal
11 should or should wish to do with respect to an express
12 statement or disclaimer or limitation, we must respectfully
13 leave that to the commission. We really don't have a firm
14 position on how the commission should treat that particular
15 item.

16 CHAIRMAN BRENNAN: Commissioner James.

17 COMMISSIONER JAMES: Thank you.

18 CHAIRMAN BRENNAN: Unless there is further discussion
19 we will go on to another issue.

20 (No comments.)

21 ASCAP, in its case, has argued that the only
22 responsibility of this body is to establish a schedule of
23 rates for those copyright owners which have appeared or whose
24 existence we are aware of. Consequently, ASCAP has suggested,
25 and I leave aside now the problems with the intercollegiate
stations and the non-affiliated, non-commercial stations.
Our only responsibility is to establish a schedule of rates
for the ASCAP repertory and the Italian Book Company repertory.

1 I would, of course, welcome a solution that would
2 reduce the workload of this body, but I do not read the copy-
3 right statute in the same fashion as ASCAP. I believe that we
4 have the responsibility under the statute to establish a
5 schedule of terms and rates for all copyright owners of musical
6 works. I believe, as both parties have agreed, that we can
7 adopt different structures based on a test of reason.

8 Very likely this body will adopt a schedule which
9 would have a blanket structure concept for performing rights
10 societies and a per composition structure to deal with the
11 so-called phantom copyright owner. But, I cannot agree with
12 the ASCAP position that we should restrict our decisions simply
13 to ASCAP and the Italian Book Company.

14 Is there any discussion on this issue?

15 COMMISSIONER JAMES: Just one question. I'll yield
16 to Commissioner Garcia.

17 COMMISSIONER GARCIA: Are you suggesting that this
18 hearing -- that we not restrict ourselves to ASCAP and the
19 Italian Book Company?

20 CHAIPMAN BRENNAN: Yes. I'm saying, Commissioner,
21 that the statute requires us to establish a schedule of rates
22 and terms which will cover all possible copyright owners of
23 musical works. I would anticipate that in that structure we
24 would give special treatment to the ASCAP and Italian Book
25 Company catalogs, but I do not believe that we can stop with
those two decisions, that we must also provide some structure
to deal with the totally unaffiliated copyright owner even
though such a person may not exist as of this date.

1 COMMISSIONER JAMES: Did we ever receive anything
2 from the Italian Book Company?

3 CHAIRMAN BRENNAN: Yes, commissioner. The letter
4 was delivered. It was made part of the record. In fact, the
5 Chairman read into the record the one paragraph of the letter
6 which was of particular relevance. It did not suggest a value
7 for the Italian catalog, but left it to this body to establish
8 a fair rate.

9 As you may recall, Mr. Aleinikoff testified that in
10 his discussions with counsel for the Italian Book Company,
11 there was a request that the Italian Book Company receive a
12 \$1,000 guarantee. Mr. Aleinikoff further testified that in the
13 judgement of Public Broadcasting that was an excessive fee.

14 COMMISSIONER JAMES: \$1,000 a year?

15 CHAIRMAN BRENNAN: Yes.

16 COMMISSIONER JAMES: In essence, really what you
17 have is ASCAP and all others, because we can probably group
18 the Italian Book Company in with a per composition rate for
19 all intents and purposes.

20 CHAIRMAN BRENNAN: I think the amount of money and
21 the interest is such that that would be a practical solution,
22 but logically we have before us two performing rights societies
23 that have not entered into voluntary agreements.

24 COMMISSIONER JAMES: We don't officially have the
25 Italian Book Company before us. That letter constitutes an
appearance?

CHAIRMAN BRENNAN: The statute provides that any
public broadcasting entity or copyright owner is subject to

1 whatever rates and determinations that we adopt, and the
2 statute makes reference to, even though such parties did not
3 make proposals to this body.

4 COMMISSIONER JAMES: I read it a little differently.
5 Where are you reading from, Tom?

6 CHAIRMAN BRENNAN: From clause three, Commissioner,
7 about half way down: "Shall be binding on all owners of copy-
8 right and work specified by this subsection and public broad-
9 casting entities regardless of whether or not such copyright
10 owner and public broadcasting entity have submitted proposals
11 to the Tribunal.

12 COMMISSIONER JAMES: All right. But, go back to
13 my initial question. Can we consider the Italian Book Company
14 as a non-entity that would be picked up by all other copy-
15 right owners at a per composition schedule?

16 CHAIRMAN BRENNAN: I would agree with my colleague
17 that we have, in terms of the copyright statute and general
18 concepts of fairness, authority to make reasonable distinctions
19 among copyright owners. It might well be that we would con-
20 clude that the Italian Book Company is such a small performing
21 rights society that it is reasonable to deal with their uses
22 on a per composition basis. But, I only invite discussion
23 on what is probably a more logical point; namely, that we have
24 two performing rights societies.

25 In the one case we will adopt some type of formula
which will be blanket in reach. Yet, with the Italian Book
Company, a performing rights society, we are not adopting or
would not be adopting a blanket formula.

1 I would think that that would be a valid distinc-
2 tion which we could sustain based upon the disparity of the
3 two catalogs.

4 Would the commissioner wish to indicate his dis-
5 position? I gather as of now he would feel that it would be
6 feasible to treat them as all others.

7 Does anybody else wish to --

8 COMMISSIONER BURG: I agree with that.

9 COMMISSIONER COULTER: I would simply like to see
10 the Italian Book Company.

11 CHAIRMAN BRENNAN: Commissioner, the Chair was
12 advised that the reason some individuals are absent from our
13 proceedings today is that they are currently in Venice at
14 an international music conference and if this body were more
15 diligent we would leave for Venice to do field research as to
16 the value of the Italian Book Company catalog.

17 COMMISSIONER GARCIA: Mr. Chairman, we leave that
18 to your leadership to get us there.

19 CHAIRMAN BRENNAN: The Chair was concerned that
20 commissioners might be kidnapped and I required a quorum
21 between now and June 8.

22 We will go into another issue; the question of
23 inflation. It is likely that certain of the terms and the
24 rates that will be adopted in this schedule will be flat
25 dollar amounts. With all due respect to Ambassador Strauss,

1 it is likely that inflation will continue at approximately
2 the same rate in the next several years. In fact, just yes-
3 terday the latest report indicates that the rate of inflation
4 for this year may be a half percentage point higher than was
5 originally estimated.

6 I believe it would be unfair to copyright owners
7 whose payments are reflected in flat dollar amounts that there
8 is not some mechanism established in our schedule whereby at
9 least once and possibly twice between June 8 of this year and
10 1983 there was an automatic adjustment of flat dollar rates
11 based upon the consumer price index.

12 It would seem particularly unfair since it is
13 possible that other copyright owners would have their payments
14 based on some percentage formula which would take into account
15 to some extent inflation.

16 Therefore, I invite commissioners to consider the
17 desirability in our rate schedule of providing at least on
18 one occasion and possibly twice for an automatic adustment of
19 flat dollar rates to reflect the rise in the cost of living
20 since the original action of this body.

21 The Federal Government has different forumlas for
22 determining the rise inthe consumer index. You have rates
23 which are geared to particular goods and services. I am not
24 sure that it would be feasible to attempt to select a parti-
25 cular category of goods or services, and it might well be

1 appropriate to simply take the total percentage increase in
2 the consumer price index. But, regardless of what the
3 mechanics may be on the policy question, I invite com-
4 missioners to address themselves now to this proposal.

5 COMMISSIONER JAMES: Mr. Chairman, without de-
6 ciding whether or not it is going to be flat dollar amounts
7 or some other kind of rate that is established, I think I
8 would agree with you that if this body were to set a rate
9 based on a flat dollar amount as the cost of living, or some
10 inflationary adjustment should be made. But, I will go one
11 step further to what you have proposed.

12 I would say that it should be done every year.
13 That a formula could be devised in that January 1st of every
14 year there would be an inflationary increase assuming we
15 would adopt a flat dollar amount. I'm making this comment
16 without predisposing that I have made a decision on whether
17 there is going to be a flat dollar amount. If we were to,
18 I would want a cost of living increase, an inflation --

19 CHAIRMAN BRENNAN: The commissioner is aware, of
20 course, when we get to the visual works that all the pro-
21 posals are in terms of flat dollar amounts. We do have
22 different approaches in regards to visual works, but at the
23 very least with regard to visual works we do have to deal with
24 flat dollar amounts.

25 COMMISSIONER JAMES: My answer is predicated on

1 an earlier statement that we're dealing only with performing
2 rights. My response is just to the performing rights aspect.
3 When I get the visual --

4 CHAIRMAN BRENNAN: I would also respond to the
5 commissioner that since we a few minutes ago decided that we
6 would have to adopt a schedule to apply to the Italian Book
7 Company and the unaffiliated, would not the commissioner
8 anticipate that that schedule would probably be based on a
9 flat dollar per use basis?

10 COMMISSIONER JAMES: That's right.

11 CHAIRMAN BRENNAN: I understand the commissioner's
12 reluctance, and I share it, to prejudge our disposition with
13 the ASCAP proposal at this time.

14 Any further discussion?

15 COMMISSIONER GARCIA: I agree with you, Mr.
16 Chairman, that whatever your decision is that we should
17 definitely allow in there for inflation.

18 CHAIRMAN BRENNAN: Very good. I think a consensus,
19 if not a unanimous, determination has been reached.

20 We go on now to consider the usefulness of ratings
21 to the determination of the Public Broadcasting schedule.
22 There was considerable discussion during the hearings as
23 to the portion of ratings, but it would appear that in the
24 statements submitted subsequent to the hearings, the value of
25 ratings was somewhat diminished. I have no strong views on

1 this subject.

2 I tend to think that standing by themselves
3 ratings are not particularly useful, but I could envisage that
4 possibly in combination with other factors, they might well
5 serve a useful purpose. But, my disposition would be not to
6 attach too much significance to the ratings.

7 Commissioner Coulter.

8 COMMISSIONER COULTER: I do have an opinion on
9 this question. I think that in the subject here is one
10 fundamental to the purpose of public broadcasting and its
11 long range interest. I think that the purpose behind public
12 broadcasting is to, in my opinion, or as I view it, is to
13 produce programs that they consider good, totally independent
14 of ratings and therefore, rather than being passive on the
15 issue, I would actively feel that ratings should be definitely
16 excluded in consideration of terms concerning public broad-
17 casting.

18 I think that the purpose behind public broad-
19 casting should be considered when we are making our findings.

20 CHAIRMAN BRENNAN: Thank you. Commissioner Burg.

21 COMMISSIONER BURG: Unlike you, I do feel
22 strongly that ratings should have no part whatsoever of a
23 formula. I reserve the judgement, though, in terms of -- and
24 I don't know that this exists, but if in addition to or in
25 conjunction with something else, it may -- I foresee a

1 possibility where it might be helpful, but standing on the
2 merits of ratings alone, I think they have no relevancy at
3 all.

4 CHAIRMAN BRENNAN: I think a consensus has arisen
5 on this point. Two commissioners have indicated that they
6 believe that ratings standing by themselves have no value
7 and this commissioner, in its original comments, indicated
8 that likewise he had no disposition to give weight to ratings.
9 I think we have reached a consensus on this point.

10 A question arises as to the extent of our juris-
11 diction. This may or may not be a hypothetical question, but
12 it's one that should be resolved at this point in the pro-
13 ceedings. Does this body have authority to establish and
14 adopt a rate structure that could result in public broad-
15 casting paying more than any of the proposals advanced by
16 copyright owners?

17 I'm not suggesting any disposition in that
18 direction, but it would be useful to resolve the question of
19 our jurisdiction, and I think clearly that if commissioners
20 felt that the record so justified that this body could adopt
21 a formula that might result in public broadcasting paying
22 higher copyright royalties than any of the proposals advanced
23 to us by the copyright owners.

24 Does any commissioner wish to comment on that
25 issue?

1 COMMISSIONER JAMES: I agree.

2 COMMISSIONER GARCIA: I want to say that I
3 definitely agree with you.

4 COMMISSIONER JAMES: I agree with you too.

5 CHAIRMAN BRENNAN: Thank you.

6 We turn now to I suppose the reason why you all
7 are here, and that is the specific formulas that have been
8 advanced by parties in these proceedings and others that
9 commissioners may well wish to propose.

10 The Chairman's reaction could perhaps to some
11 extent and not entirely jokingly be described as none of
12 the above, but a choice has to be made. I do not, in opening
13 this discussion, wish to become involved in the details
14 of a particular formula, but just to address myself to a few
15 general considerations.

16 At the start of these proceedings my disposition
17 was towards a formula that would, in terms of the copyright
18 system, be as consistent as possible with the practice in
19 commercial broadcasting ventures. I believe that public
20 broadcasting fortunately is emerging as a viable programming
21 alternative to commercial broadcasting.

22 On the other hand, in the operations and structure
23 of public broadcasting, I see imitations of what is being done
24 by their bigger brothers and sisters in commercial broad-
25 casting. Consequently, I was not, and I still am not

1 unsympathetic towards a viable structure that would follow
2 the commercial practice.

3 I believe that the testimony by Public Broadcasting
4 has pointed out some problems with that general approach.
5 Also, questions have arisen as to the desirability of in any
6 way limiting the public broadcasting schedule to income or
7 revenues. This is the one area where I do give some weight
8 to the material in the ASCAP statement concerning the practice
9 in other countries.

10 As Public Broadcasting has correctly observed,
11 in terms of amount of payments, you simply cannot compare
12 our public broadcasting structure with that in other
13 countries. In most of these foreign countries the government
14 system has a monopoly and even in countries where there is
15 some commercial broadcasting, it is still dominated by the
16 government system.

17 The ASCAP materials that, in my opinion, have not
18 been disputed effectively by Public Broadcasting in this
19 area suggest to us a general practice of basing the copyright
20 payment on a percentage formula linked to income or budget.
21 I think that is perhaps where I will rest for the moment
22 and invite my colleagues to first make any general obser-
23 vations they wish on formulas and then after the luncheon
24 recess we will go on and consider particular structures.

25 Does any commissioner wish to make any general

1 observations as to their tentative thinking on formulas?

2 Commissioner Burg.

3 COMMISSIONER BURG: In general, as I consider
4 the various proposals offered to the Tribunal, I must say
5 in all candor that I am not entirely satisfied or happy with
6 any of them. I have great reservations about anything based
7 on revenues, because I don't think parity exists between
8 public broadcasting and commercial broadcasting. I have
9 indicated my unhappiness with ratings and so I am exploring
10 another tact, if you will, and I am giving it a great deal
11 of consideration.

12 I have not come to any hard and fast feelings on
13 it, but my consideration focuses on market populations which
14 I think might realistically result in some -- in a great deal
15 of equity and fairness. This would, of course, have to be
16 linked to some kind of qualifier and I have not worked that
17 out as yet. I am also aware that we haven't discussed this
18 in any great length in past hearings, though I think the
19 concept was introduced marginally at one point.

20 Mr. Chairman, might I make a request of the
21 parties here today that they submit their thinking to us on
22 a proposal or on a formula based on some form and this
23 admittedly is ephemeral now. I haven't tacked it down.
24 I would like to have the thinking of both ASCAP and Public
25 Broadcasting on some kind of a formula based in part or in

1 whole on market populations. The date is May 4. Would a
2 week give you sufficient time to reply to this request?

3 MR. ALEINIKOFF: Is this a request?

4 COMMISSIONER BURG: It is a request.

5 MR. ALEINIKOFF: Can we have the Monday after?
6 In other words, can we have two weekends. Is that too long?

7 COMMISSIONER BURG: Sure.

8 CHAIRMAN BRENNAN: I think that is too long
9 because it would effectively prevent us from further deliber-
10 ation until after that time.

11 Let me suggest this. It certainly is not expected
12 that either side now can make any definitive comment on the
13 commissioner's proposal. Possibly, however, some first
14 reactions could be forth coming and before deciding on how
15 much time would be given for a written comment, would either
16 ASCAP or Public Broadcasting be prepared with the under-
17 standing that certainly nobody is being held to what is said
18 now, be able to give us some initial reactions to this
19 proposal?

20 COMMISSIONER COULTER: You are making a specific
21 statement that there is no precedential effect?

22 CHAIRMAN BRENNAN: This would be, commissioner,
23 in the category of those offers that were made in private
24 discussion that are totally excluded from any weight in these
25 proceedings. What the Chairman is trying to do is bearing in

1 mind the limitations imposed by the statute is to at least
2 get some expression or viewpoint as early as possible with
3 the further opportunity within a week or so for a more
4 definitive rebuttal.

5 COMMISSIONER JAMES: Mr. Chairman.

6 CHAIRMAN BRENNAN: Commissioner James.

7 COMMISSIONER JAMES: Before I respond, I'm a
8 little confused about what is being asked. Can Commissioner
9 Burg clarify what course she is pursuing as far as establish-
10 ment of a rate?

11 COMMISSIONER BURG: Yes. I'm talking about market
12 population; that is, numbers of people in any given broad-
13 casting market. Obviously we have to restrict it to the
14 market that public broadcasting, both television and NPR
15 radio are in and find those figures. Those figures are
16 available from several sources. I don't see any great delay
17 in finding or getting the figures in our hands, but it gives
18 us some gross numbers and obviously you have got to do some-
19 thing with those gross numbers. But, the concept of market
20 population is not entirely invalid in the broadcasting
21 industry. Does that answer your question?

22 COMMISSIONER JAMES: Once you get -- this is an
23 alternative to what, revenue?

24 COMMISSIONER BURG: According to my thinking,
25 yes. It's an alternative to revenue. It could be -- let me

1 say it this way. It could be an alternative to revenue. It
2 could be an alternative to ratings. It could be an alternative
3 to anything else that might have been suggested.

4 COMMISSIONER JAMES: Once you get the population
5 then what --

6 COMMISSIONER BURG: Then you have to devise a
7 formula of how much per person, what that is in terms of a
8 percentage or part of a percentage or part of a dollar or part
9 of a penny or what have you, to come to a dollar figure.
10 There might be some qualifier in it. As I stated, it may
11 have to hook onto something additional.

12 I don't have all the answers to this. I prefaced
13 my statement saying that I was dissatisfied with the revenue
14 formula. I was dissatisfied with the ratings formula. I
15 don't know -- I'm looking for something else that might be
16 helpful. This may or may not be it. I'm not wedded to it.
17 I'm simply exploring the possibility and hope to explore it
18 in some depth in the time we have remaining.

19 It has not been considered generally before this
20 body. As I say, it is a valid measurement in the industry
21 itself. It may be applicable. It may not. I would like your
22 thinking from both sides before I make up my mind.

23 COMMISSIONER JAMES: Thank you, commissioner.

24 CHAIRMAN BRENNAN: Mr. Koenigsberg, can you
25 enlighten us?

1 MR. KOENIGSBERG: Well, Mr. Chairman, let me first
2 of all take your disclaimer you put in and heighten it a bit.
3 Unlike my colleagues on the Public Broadcasting side, we do
4 not have a principal here today with the business people who
5 would know the details and the ins and outs of the suggestion
6 of Commissioner Burg. So, I'd be speaking only as counsel
7 and not really substantively on it, though, of course, we
8 could look at the issue given a bit of time. I would think
9 that the week after Monday would be -- I think we could do
10 it much quicker than that.

11 My thought is this. There are some cases in the
12 foreign countries where foreign public broadcasters do pay
13 performing rights fees on a per capita basis, but if my memory
14 serves, in those cases the usual reason I think is that the
15 public broadcasters themselves receive money from their
16 government, in essence, on a per capita basis, on a tax on
17 receivers. This is the case in some foreign countries in
18 Europe, in England, I think in Germany, and it may be in
19 Australia. I'm not sure.

20 So, that one really ties to the other and it brings
21 me back in my thinking just off the top of my head to the
22 revenue notion. It is a payment on a per capita basis that
23 is tied to the revenue notion.

24 The other point I would make is that I don't
25 recall at all what the market coverage of public broadcasting

1 in the United States is in detail, but I have a general
2 feeling from what was put in that it is substantial that you
3 have a coverage on a substantial percentage of the population.
4 As I recall, virtually every major market which represents
5 the overwhelming bulk of the population in the United States
6 is covered so that I'm not sure what differentiation between
7 the public sector and the commercial sector, if you will, an
8 analysis of the market population would make.

9 That's just my thinking off the top of my head.
10 As I say, I'd really like to get the thinking of our business
11 people and our economists on this point.

12 CHAIRMAN BRENNAN: Does either the director or
13 counsel wish to make a statement?

14 MR. LATMAN: We'd like to express our initial
15 thinking right after lunch.

16 CHAIRMAN BRENNAN: That's quite agreeable. Does
17 Commissioner Coulter wish to make some general comments now
18 on his approach to the formula?

19 COMMISSIONER COULTER: Yes. My concern is, as I
20 said before when I was talking, my problem with basing anything
21 upon ratings is close to Commissioner Burg's, is that the
22 suggestion by ASCAP that Public Broadcasting resemble com-
23 mercial networks, I'm afraid I disagree with. I feel that
24 it is our obligation to respect the particular character of
25 public broadcasting and that in the commercial world there is

1 a relationship between revenues and ratings.

2 If you are going to follow the reasoning and the
3 philosophy behind the reasoning that Public Broadcasting,
4 in pursuing its purpose should be as independent from dependency
5 on ratings as possible, therefore the revenue standard is
6 also inapplicable. That's my feeling on that subject.
7 So, I would be against a formula based on revenue because
8 I feel it is in the commercial world tied to ratings and I
9 would not want to do that to Public Broadcasting.

10 I also think, though, that that doesn't exclude
11 working out some formula that respects the fair market value
12 of the repertory which is obviously determined in the com-
13 mercial world. I don't think that preserving the character
14 of public broadcasting and at the same time respecting the
15 fair value of the ASCAP repertory that there has necessarily
16 to be a conflict in any formula that I would favor.

17 I guess I'm sympathetic to the views expressed
18 by Commissioner Burg, is that I would want to achieve both.

19 CHAIRMAN BRENNAN: Thank you, commissioner. Does
20 Commissioner James wish to make a general statement?

21 COMMISSIONER JAMES: I have no problems with
22 revenue. That is the one certain thing that there can never
23 be problems within defined parameters, any discussion about.
24 You either have X number of dollars or you have Y number of
25 dollars. Devising a proper ratio of how you attach to the

1 dollar amount I think can be devised. I'm not too happy
2 with either Public Broadcasting or ASCAP's formula or their
3 ratio quota multiplied times revenue. But, I have no
4 problems with a formula based on revenues at this point.

5 I think I have some concept or understanding now
6 of what Commissioner Burg and Commissioner Coulter are talking
7 about, talking about market population. If that can be used
8 as the substitute for revenue within a certain parameter,
9 I can see where I might adopt that. But, until that is
10 firmly adopted, I think the only alternative that we have to
11 arrive at a fair and equitable value on a repertory is the
12 revenue basis and if the population thing falls through,
13 what alternatives do we have.

14 COMMISSIONER GARICA: Mr. Chairman, I have
15 definite interest in exploring the possibility that Commis-
16 sioner Burg brought up, that is market population and I also
17 feel the same way as the rest of my commissioners that I do
18 want something that is fair and equitable to both parties. I
19 think that this is an interesting and challenging concept
20 and once we get the additional information that we need,
21 I think I have some ideas as to how we could apply this
22 information in coming up with a rate, as Commissioner Burg
23 said, using it on a per head basis.

24 Also, as far as the revenue is concerned, I know
25 that we have heard a lot of comments from PBS that they are

1 unlike commercial broadcasting and, of course, in this case,
2 we should not be using revenue. I think that that also
3 offers a possibility that we can use revenue and maybe ex-
4 cluding some of the in kind services.

5 In addition to that, Mr. Chairman, I definitely
6 I guess, at this time, am endorsing a formula basis as
7 opposed to a flat rate basis.

8 CHAIRMAN BRENNAN: Thank you, commissioner.

9 I would, if there is no objection from colleagues,
10 effect a deadline of a week from today for the filing of
11 comments on the proposal of Commissioner Burg. I would imagine
12 that the intention of our proposal is to allow any person
13 with an interest in the subject to file comments and that the
14 opportunity is not restricted to Public Broadcasting and
15 ASCAP.

16 Following the luncheon recess we will give Mr.
17 Latman or his colleague the opportunity to give us the benefit
18 of any first impressions of Commissioner Burg's proposal.

19 We will now recess until 2:00 p.m.

20 (A recess for lunch was held.)
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23
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25

AFTERNOON SESSION

CHAIRMAN BRENNAN: The meeting will resume.

At this point, the Chair will recognize a representative of Public Broadcasting.

MR. LATMAN: Thank you. My name is Alan Latman again, or still, for the record.

The position of Public Broadcasting, of course, with regard to this new and creative suggestion has to be taken against our -- in the context of our position that has been expressed by other people today. In other words, that if you use a revenue base, you were doing something inconsistent with the basic activities and commission of public broadcasting.

This market population suggestion is definitely an interesting one, which we would definitely want to explore, and I gather we'll have to do so immediately. There are just two comments that I could -- maybe three that I could make right now.

First, equally consistent with our mission, we think, is the concept of the national system. And we tried to introduce testimony which we think documents that fact, that we really have a system which is national. And therefore, when we focus initially on the question of market population, we come to the position that our market is really a national market. A population for that market

1 can be ascertained I think.

2 But the point I stress is that in our initial
3 thinking market population, from our point of view, should
4 be and would be really national. I don't know if that--

5 COMMISSIONER BURG: No, I follow what you mean.

6 MR. LATMAN: --if there are any questions on
7 that.

8 Secondly, Commissioner Burg mentions specifically
9 the fact that this has to be applied with some kind of
10 qualifiers. And of course, that is the part of, perhaps,
11 the concept in terms of what they should be. And we will
12 certainly try our best in this short time to suggest what
13 they might be. We do not have any suggestions right off
14 the bat at this point.

15 Thirdly is the fact that when we do shift to
16 this concept, which we do say is an interesting one we would
17 like to explore, we do it also against the back drop of
18 agreements and contending, if you will, with BMI and
19 SESAC. In other words, the concept as the Tribunal is
20 focusing on it, and as we would be, would be a concept
21 based on population, market population, but presumably
22 applicable only to ASCAP.

23 And we think that in doing so, the Tribunal
24 would have to take into account that there is also BMI
25 and SESAC out there. And for example, regardless of what

1 we say about precedential effect or non-precedential
2 effect, completely consistent with the discussion earlier,
3 it is quite conceivable that in the next negotiating round
4 BMI or SESAC would say: well, okay, that's fine, let's
5 use population -- assuming the hypothesis that the Tribunal
6 use that. And then, of course, would want some fee based
7 on that.

8 And all we're saying is that whatever these
9 qualifiers are, one has to take into account that we're
10 qualifying down to ASCAP, if you will. Those are our
11 rather fragmentary initial thoughts. And we will certainly
12 make every effort to get you a written statement within
13 the time period.

14 CHAIRMAN BRENNAN: Thank you, Mr. Latman.
15 The Chair would like to restate what he indicated this
16 morning, namely that any person may file comments on
17 Commissioner Burg's proposal. And it's in no way limited
18 to Public Broadcasting and ASCAP.

19 I understand that ASCAP counsel have made
20 their statement and are prepared to delay further comment
21 until their written statement. Any further discussion?

22 (No verbal comment.)

23 CHAIRMAN BRENNAN: We will now temporarily
24 lay aside the market population formulation and consider,
25 on a hypothetical basis, some other possible formulas.

1 And clearly the first one to consider, since it was
2 already touched upon this morning, would be a formula
3 related to revenues. And in addition to the policy issues,
4 which were touched upon this morning, you have the
5 practical problems and the mechanics of the formulation
6 based on revenues.

7 The position of Public Broadcasting, leaving
8 aside for the moment the policy issues, is that a formula
9 based on revenues would cause serious bookkeeping and other
10 problems for their operations. Needless to say, ASCAP
11 does not share that analysis.

12 Public Broadcasting also suggests that if we
13 were to establish a formulation based upon revenues, it
14 would be necessary for this body to adopt a number of
15 interpretations and guidelines, which would probably
16 utilize the talents of Commissioner Garcia in the
17 accounting area.

18 I would now ask if there are any Commissioners
19 who at this time would desire to make additional comments
20 on the revenue possibility?

21 (No verbal response.)

22 CHAIRMAN BRENNAN: For the sake of discussion,
23 let us assume that a majority of the Commissioners might
24 be attracted to the revenue concept. It would be useful
25 to explore what some of the problems are with that approach.

1 And one issue is the question of whether any revenues ought
2 to be excluded from the computation; and specifically,
3 whether federal government, state government and local
4 government revenues should be in total, or to some degree,
5 excluded from that formulation.

6 Are there any Commissioners who wish to
7 address themselves to that issue?

8 COMMISSIONER COULTER: Yes.

9 CHAIRMAN BRENNAN: Commissioner Coulter?

10 COMMISSIONER COULTER: I don't think that the
11 federal funds or government funds, per se, should be
12 excluded, because that means that it can't be paid by
13 the federal government, which I feel a little uncomfortable
14 as a concept--or state government.

15 CHAIRMAN BRENNAN: Commissioner James?

16 COMMISSIONER JAMES: Yes, I agree with
17 Commissioner Coulter. As far as I'm concerned, the federal
18 funds, when they get into the hands of Public Broadcasting
19 Systems, have lost any identity with the federal government.
20 They use them to pay the rent, the phones, the gas, the light
21 bill. All funds, no matter where derived from, I think
22 would have to be used in a basic formula to end up with
23 what is the gross revenue on which a rate could be based.
24 I would be against any exclusion of any funds or the allowance
25 of any deductions.

1 CHAIRMAN BRENNAN: I share the views of
2 my two colleagues. Commissioner Burg?

3 COMMISSIONER BURG: I have some reservations.
4 I have not made up my mind on that particular question. I
5 do have a question though, and that is based on the
6 Educational Broadcast Facilities Act of 1972, which
7 stipulated that the Department of HEW was authorized to
8 contribute 32 million dollars in financial assistance for
9 these purposes over a five-year period. Is that 32 million
10 dollars computed in the 27.7 percent that the federal
11 government granted Public Broadcasting in 1976, or is
12 that an additional figure?

13 MR. SMITH: I'm not sure; we will provide you
14 with an answer. I'm not sure whether that's money just to
15 CPB or whether it also includes facilities.

16 COMMISSIONER BURG: Thank you.

17 CHAIRMAN BRENNAN: Any further observations?

18 (No verbal response.)

19 CHAIRMAN BRENNAN: Then another question that
20 arises in connection with a formulation related to
21 revenues is the concept reflected in both the SESAC
22 analysis and the ASCAP proposal to provide a system of
23 discounts.

24 Under the ASCAP proposal, you would begin with
25 a discount of 50 percent, and this would be gradually

1 reduced. This Commissioner does not see any logic
2 in that suggestion to gradually reduce the amount of the
3 discount. If a discount at X percentage is justified in
4 1978 because of the status of Public Broadcasting, I do
5 not see any reason why it should be at 40 percent or 30
6 percent or 20 percent in subsequent calendar years unless
7 something has changed with regard to the operations of
8 Public Broadcasting. And the ASCAP brief does not suggest
9 what that might be.

10 I'm not opposed to consideration of a
11 discount formulation, but I do not favor the ASCAP proposal.
12 Do any other Commissioners wish to comment?

13 COMMISSIONER JAMES: Yes.

14 CHAIRMAN BRENNAN: Commissioner James?

15 COMMISSIONER JAMES: Yes. I've had a problem
16 with the discount from the get-go really. I don't think
17 there is any legal authority for us to grant a discount.
18 As I read the statute, it says we're to get a reasonable
19 compensation predicated on fair value. And for us to
20 consider reaching a fair value, and then say: Okay, it's
21 going to be discounted--I see no legal authority for us to
22 do that.

23 Now, if ASCAP--once we set the figure--if
24 ASCAP wants to give back a portion on some kind of
25 side current agreement, that's well and good. But I don't

1 see any justification or jurisdiction for us to permit a
2 discount. If there is one in that law, I'd like to see it.

3 CHAIRMAN BRENNAN: My understanding is that
4 independently of what we might do, assuming the total
5 payment was essentially what would be provided under the
6 basic ASCAP formulation that would be policy of ASCAP by
7 their own initiative to--

8 COMMISSIONER JAMES: If they had stated that
9 on the record. But I don't think we can take that into
10 consideration in setting our final determination of what
11 that rate should be is what I'm saying.

12 CHAIRMAN BRENNAN: I have a mild dispute with
13 my colleague. I think we do have authority to establish
14 whatever rates we believe are reasonable, and which would
15 provide, as you say, fair value. And if we decided that
16 an appropriate formulation would be a percentage based
17 upon the formula of ASCAP, and then to discount that, I
18 think that would be within our legal jurisdiction. I'm
19 not sure it's a wise action. But I do think we do have, in
20 my opinion, very wide discretion in terms of what we
21 adopt as to the formula.

22 COMMISSIONER JAMES: I agree with that. But
23 I don't think we can call it a discount. In other words, if
24 we decide on a figure of 4 million dollars, and we think,
25 for other reasons, that there should be two million, I don't

1 think we can say: it's four million; we're giving a
2 discount of 50 percent. I just don't--in the legislative
3 history or anything in the Act--I don't see where it's
4 within our authority to say we're granting a discount.

5 That's what you're saying, isn't it, that there's
6 specific authority to do that? I know there's broad
7 authority to--

8 CHAIRMAN BRENNAN: No, I'm not saying there's
9 any specific authority, because obviously the statute only
10 speaks in terms of reasonable rates and terms. But what
11 I'm saying is that if we were to adopt the basic approach
12 of the ASCAP proposal, that I am satisfied that we would
13 have jurisdiction and authority to inject into that some
14 type of a discount formulation.

15 For example, Commissioner, the statute invites
16 us to consider voluntary agreements which have been entered
17 into, Commissioner Coulter and I had a talk this
18 morning, concerning the SESAC agreement and the question
19 as to whether or not the discount approach would be utilized
20 in that formulation. So, I'm satisfied that we have the
21 legal authority to do so. I'm not convinced as of now that
22 we ought to do it. But I think we do have the authority.

23 COMMISSIONER JAMES: What happens when two
24 lawyers disagree? Always you go to court. But I'm of the
25 opposite opinion, Mr. Chairman.

1 CHAIRMAN BRENNAN: That's why we have five
2 commissioners. Commissioner Burg?

3 COMMISSIONER BURG: I agree with you that--
4 apart from the legal question, which I'm not prepared to talk
5 about--but if a discount is valid in Year One, I don't
6 know why a subsequent discount is more or less valid in
7 Year Two, Three, Four and Five.

8 In terms of whether we have jurisdiction of
9 discount, I think maybe that's semantics. And if we
10 arrive at a figure, Commissioner James was saying that
11 if you're talking four million, and then you discount it
12 by 50 percent, you're really talking two million--you just
13 do that, do that figure and forget about the discount.

14 COMMISSIONER JAMES: Then that becomes a
15 reasonable rate.

16 COMMISSIONER BURG: That's the least of my
17 worries is the semantics of discount. But apart from that,
18 if we decided that the discounts, we have the jurisdiction
19 to apply them, I certainly would come down very strongly
20 on the fact that it should be applied uniformly through
21 the length of the contract.

22 CHAIRMAN BRENNAN: Any further discussion on
23 discounts? Commissioner Garcia?

24 COMMISSIONER GARCIA: Hopefully that one of the
25 reasons that we're hesitant in adopting the ASCAP formula,

11

1 as they present it to us, is because we recognize the
2 fact that non-commercial broadcasting is unique to
3 commercial broadcasting. And if we are seriously considering
4 Commissioner Burg's proposal earlier today about a
5 formula based on market population, I would hope that as
6 a Tribunal whatever formula we adopt, it would definitely
7 take into consideration the uniqueness of non-commercial
8 broadcasting. And in itself, that formula would already
9 address itself to the discount.

10 I think if we provide a discount on top of
11 the formula, and if we go through this exercise of asking
12 both parties to comment on this, then I really think
13 we're playing games with ourselves if we allow a discount
14 on top of that--otherwise, we can just go to the flat fee
15 or the formula that ASCAP has submitted saying: okay, in
16 addition to that, give them a 75 percent discount for
17 whatever the figure should be.

18 CHAIRMAN BRENNAN: Well, let me see if I can
19 presumably speak for Commissioner Burg. I do not believe
20 that Commissioner Burg contemplated the discount mechanism
21 in the Commissioner's proposal. And that the discussion
22 now of discounts is on the hypothetical assumption that we
23 would adopt a revenue formulation somewhat similar to the
24 ASCAP proposal. Do I correctly state your position,
25 Commissioner Burg?

1 COMMISSIONER BURG: Yes, you do.

2 COMMISSIONER GARCIA: Mr. Chairman, just so
3 that I make sure I understand what you're saying and you
4 understand what I'm saying -- hopefully this formula, if we
5 explore this formula, would lead to a more favorable and
6 equitable distribution. And I'm saying if that is the case,
7 we extend this formula, what I'm saying is that that, in
8 itself, is an adequate discount. And on top of that, I do
9 not think that we should be addressing ourselves to an
10 additional discount. Otherwise, we're playing games with
11 ourselves.

12 CHAIRMAN BRENNAN: I agree. And I think the
13 proponent of the concept also agrees.

14 Another suggestion that arises in connection
15 with the revenue concept is assuming that we adopt a
16 percentage rate formulation, should we oppose a dollar
17 ceiling to provide that irrespective of what payments might
18 be required under the percentage formulation, the actual
19 payments in any one calendar year shall not exceed specified
20 number of dollars.

21 ASCAP suggests that we might want to consider
22 the recent experience in the United Kingdom in that regard.
23 I'm not acquainted with what led to the action of our
24 British cousins, but it would seem to me that if we had
25 established a fair and workable formulation, that that should

13

1 be controlling and that should determine the amount of
2 payments in any one calendar year, and that there should
3 not be any ceiling. Does any Commissioner wish to address
4 that?

5 COMMISSIONER JAMES: I agree.

6 CHAIRMAN BRENNAN: A consensus has been achieved.

7 Another possible formulation would be for this
8 body to adopt a rate schedule which would provide, as
9 between ASCAP and PBS and National Public Radio, a yearly
10 flat payment in a specified number of dollars. I suppose
11 our findings would indicate, after careful study of the
12 record, we had determined that this was a reasonable payment
13 and provided the fair value for the materials being
14 utilized.

15 But it would not be linked to any concept
16 based upon population, revenues, ratings or whatever. I'm
17 not attracted to this formulation, but it is certainly
18 one that has to be considered. Are there any Commissioners
19 who believe that it would be desirable to adopt a rate
20 schedule which would simply set forth a flat dollar sum
21 for each calendar year?

22 COMMISSIONER BURG: Mr. Chairman, I remember
23 at least one instance in the testimony Mr. Korman indicated,
24 and I presume he meant this, was that he was more--or
25 "they", ASCAP was more interested in the formula than they

1 were in the dollar amount. I'm not sure how I feel about
2 this at this moment. But I want to bring that out, that
3 at least one party seems to be very interested in the
4 mechanism more so, apparently, than the dollars.

5 COMMISSIONER JAMES: I agree with your
6 comment, Mr. Chairman.

7 COMMISSIONER COULTER: I would simply say that
8 it would make things a lot easier.

9 CHAIRMAN BRENNAN: We will reserve further
10 discussion of the market population approach until a later
11 date. But the Chair would just observe that if we go in
12 a direction of a population formulation, I can conceive
13 of ASCAP becoming a very strong supporter of the Right to
14 Life Movement. (laughing) Commissioner Coulter?

15 COMMISSIONER COULTER: Parenthetically, I'd
16 like to remark that Commissioner Burg alluded to the fact
17 that the market population idea had already been mentioned
18 in the record, and it's included in one of the SESAC
19 documents. I just thought I'd approach that.

20 CHAIRMAN BRENNAN: Immediately prior to the
21 deadline for written comments for this proceeding, the
22 Tribunal received a letter from the All Industry Television
23 Licensing Committee, which letter is part of the docket
24 of this proceeding.

25 The letter takes exception to certain

1 representations made by ASCAP during this proceeding,
2 indicates that as far as commercial broadcasters are
3 concerned, they are not happy with a copyright payment
4 based upon a percentage of revenues. And the letter almost
5 comes close to suggesting that it was only because of
6 any lack of viable alternative that they entered into
7 such licenses.

8 ASCAP has circulated to Commissioners a
9 reply to that letter. The ASCAP letter, obviously, has
10 been read by Commissioners, but is not, my motion of
11 ASCAP, part of this record, since the ASCAP letter came
12 after the deadline for insertions in the record. I think
13 it would be probably useful if the Chair were to suggest
14 that there is no objection that the ASCAP letter be made
15 part of the record of this proceeding. Is there objection?

16 (No verbal comment.)

17 CHAIRMAN BRENNAN: In part, the reason for my
18 request is that since I already have alluded to the letter
19 and gave a capsule summary, which may or may not be shared
20 as a fair analysis, it would perhaps be well if the full
21 text be inserted in the record. And I so request.

22 (No verbal comment.)

23 CHAIRMAN BRENNAN: Without objection, the
24 letter will be made part of the record.

25 The Chair also notes that a comment on this

1 subject in the form of a letter from Public Broadcasting
2 has been received by the Tribunal. If there is no objection,
3 I would direct Public Broadcasting letter be made part of
4 the record and inserted at this point.

5 COMMISSIONER JAMES: Mr. Chairman, I'd like
6 to make a comment about that letter, which is really
7 directed at the weight that we should probably give to it.
8 I'm a little disturbed that that letter, without any
9 question, has to be considered very damaging to ASCAP's
10 position, came to us in the eleventh hour. I know not
11 whether the All Industry had a representative here at the
12 hearing, but I'm sure if they keep track of the trade
13 papers and knew that a hearing was going on, I see their
14 reporter is here today--so, they had some indication
15 that these hearing were going on.

16 And they wait almost until the last possible
17 moment to drop that type of a bombshell, makes me question
18 the motives and intent behind that letter. So, I think
19 in considering it, since it did get in and was made part
20 of the record, was not subject to any extensive cross-
21 examination. We have no way of verifying the truth of
22 what was said in that letter, that we would be very careful
23 about the appropriate weight that we give to that letter.

24 COMMISSIONER BURG: Mr. Chairman?

25 CHAIRMAN BRENNAN: Commissioner Burg.

1 COMMISSIONER BURG: I think I might add, for
2 the record, that long before I saw the letter from that
3 committee the substance was recorded in Broadcasting
4 Magazine, and I read the article there.

5 CHAIRMAN BRENNAN: I agree with Commissioner
6 James as to the weight to be given to the letter. I think
7 we are aware that in a sense it's a self-serving letter
8 to deal with debates in a letter form. But in terms of
9 the rights of that committee, they did comply with the
10 rules of procedure; they were within their rights in
11 waiting until the final day or so for the submission of
12 comments.

13 We go on now to the consideration of various
14 clauses in the so-called licenses which have been
15 suggested to us by ASCAP and Public Broadcasting Systems.
16 I indicated in the morning session my personal view on
17 this subject, that I think the entire terminology and
18 concept of licenses is not contemplated by the Congress
19 in terms of this proceeding. But it is our responsibility
20 to examine the various proposals which have been made under
21 that concept.

22 One of these is the proposal contained in
23 Clause Three of the ASCAP license, which would have this
24 body adopt regulations that would exclude up to several
25 hundred compositions from the scope of the license. The

1 argumentation in support of that clause is set forth in
2 the ASCAP presentation. In substance, it is to prevent
3 harmful effect upon certain musical works.

4 I find it unnecessary to formulate an opinion
5 as to whether or not the use of these works would be
6 damaging to their copyright projection because ASCAP has
7 not persuaded to me that it is within jurisdiction of this
8 body to exclude works from the scope of the compulsory
9 license.

10 Under the statute, non-commercial broadcasting
11 entities have a right to make use of copyrighted musical
12 works for various purposes, subject to the rates and
13 terms established by this body. ASCAP argues to us that
14 the proposed exclusion is a reasonable term. I do not
15 agree with that interpretation.

16 I note, in passing, that later in the
17 afternoon we'll be taking up some issues involving visual
18 works, which may or may not produce the same result in my
19 mind. But insofar as the proposed Section Three of the
20 ASCAP license is concerned, I do not believe it is within
21 the jurisdiction of this body to exclude such compositions
22 from the scope of the compulsory license.

23 Is there discussion on this point?

24 COMMISSIONER JAMES: I agree, Mr. Chairman.

25 COMMISSIONER GARCIA: So do I.

1 CHAIRMAN BRENNAN: We go on now to consider
2 some proposals contained in the Public Broadcasting
3 license. And since it is getting on in the day, to save
4 time, we could perhaps group these together, since, to
5 some extent, they present the same policy and legal issues.

6 We have Clause Seven of the Public Broadcasting
7 license, which deals with the licensor indemnifying the
8 Public Broadcasting entity. And we have the issue of the
9 ancillary audio-visual educational uses.

10 My view on both of these subjects is that
11 perhaps these are meritorious provisions. Perhaps if
12 voluntary agreements had been reached, they could have been
13 usefully included in such voluntary agreements. But I
14 cannot accept the argument made to us by Public Broadcasting
15 that in some fashion the fact that these clauses were
16 included in voluntary agreements gives us jurisdiction
17 as part of our rulemaking power to impose them as reasonable
18 terms.

19 Consequently, I would not favor concluding in
20 our structure provisions of that nature. And in passing,
21 I would like to call to the attention of my colleagues a
22 fairly recent federal court decision in the United States
23 District Court, the Western District of New York, case of
24 the Encyclopedia Britannica Educational Corporation versus
25 Crooks.

1 Now, let me say that the Chairman is not
2 characterizing the defendants as crooks. But it just so
3 happens that the first of a number of defendants is named
4 "Crooks". In this case, copyright owners, including the
5 Encyclopedia Britannica Corporation, successfully sought a
6 preliminary injunction against the agency of the
7 Erie County School System that was engaged in systematically
8 videotaping television transmissions.

9 The Court analyzed the problem, made reference
10 to the Copyright Act, and to the proceedings in Congress.
11 I note, by the way, that this suit was filed on the same
12 day that President Ford signed the new Copyright Act.
13 In any case, I believe that the analysis in this opinion
14 gives us more guidance than the reference in the Public
15 Broadcasting brief to the Teleprompter and Aiken (ph) cases.
16 For these reasons, I do not favor the inclusion in our
17 regulations of these clauses of the Public Broadcasting
18 license. Is there discussion on these--

19 COMMISSIONER JAMES: I agree with the Chairman.

20 COMMISSIONER BURG: I agree.

21 CHAIRMAN BRENNAN: We turn now to another
22 issue. The statute requires that in addition to establishing
23 rates and terms, we must adopt regulations whereby copyright
24 owners will be notified of the uses of their work. And in
25 this connection, we have to again look at the voluntary

21

1 agreements. And lest this Commissioner be accused of
2 being inconsistent, I do, in fact, plan to take a different
3 position on the voluntary agreements with regard to
4 record-keeping than I did with philosophy and rates.

5 Commissioners are aware of the record-keeping
6 provisions of the BMI and SESAC agreements. In reviewing
7 the ASCAP presentation, I have found nothing that would
8 cause me to come to the conclusion that the record-keeping
9 provisions, for example, of the BMI voluntary agreement
10 are not adequate for the purposes of copyright owners.
11 And while, perhaps, some flexibility might be desirable
12 as to the number of local stations to be surveyed and
13 the frequency of the survey, I believe that the record-
14 keeping provisions of the BMI agreement give us good
15 guidance and also are adequate to meet the requirements
16 of the copyright statute.

17 Is there any discussion on this point?

18 COMMISSIONER BURG: Mr. Chairman, I agree
19 completely.

20 COMMISSIONER JAMES: I disagree.

21 CHAIRMAN BRENNAN: Commissioner James.

22 COMMISSIONER JAMES: You have to use the BMI
23 record-keeping in connection with how they're paying their
24 fee and what is the basis of that fee orientation. If we
25 take a population approach or a revenue approach, are you

22

1 saying that they can survey and that the nationals are
2 the only ones that have to present that information to us?

3 CHAIRMAN BRENNAN: Well, what you conceive to
4 be the main purpose of the record-keeping that we have a
5 blanket license.

6 COMMISSIONER JAMES: Well, we haven't decided
7 on a blanket yet. If I understand what you and Commissioner
8 Burg are agreeing on is that regardless of what kind of--
9 if it's not a blanket--not a blanket license. On a blanket
10 license that effects all entities through a term.

11 In other words, if it's done by population,
12 every station will be contributing based on a population, is
13 my understanding of the concept. Then that individual
14 station has utilized certain music, so that to follow
15 the BMI reporting system is not going to be an adequate
16 system for ASCAP to make the subsequent payments to their
17 members.

18 CHAIRMAN BRENNAN: Why not?

19 COMMISSIONER JAMES: Because I don't think that
20 the utilization of the music at a national level is a
21 reflection of what's going on in the local level.

22 CHAIRMAN BRENNAN: Yes, but Commissioner, in
23 the BMI proposal, there is an option which has been
24 extended to BMI to request, I believe, once a year, a survey
25 of certain numbers of local stations. And I'm quite flexible

1 as to the frequency of that local station survey and the
2 number of local stations to be surveyed.

3 COMMISSIONER JAMES: All right.

4 CHAIRMAN BRENNAN: But I think basically the
5 structure of the BMI proposal, national cue sheets and
6 perhaps once or twice local stations survey should be
7 adequate for distribution purposes.

8 COMMISSIONER JAMES: Well, I have a problem
9 with writing or promulgating any terms that leaves it to
10 the discretion of one party or the other. I think we ought
11 to just say the terms should be clearly delineated that
12 this has to be done. That's another reason why I disagree
13 with BMI.

14 I'm inclined to go along more, but not 100
15 percent, with the ASCAP proposal.

16 CHAIRMAN BRENNAN: In responding to my
17 colleague's observations, I thought I had said that I was
18 certainly not wedded to the fine print of the BMI agreement.

19 COMMISSIONER JAMES: Oh, okay.

20 CHAIRMAN BRENNAN: But--the transcript will
21 reflect what I said.

22 COMMISSIONER JAMES: I missed it; I'm sorry.

23 CHAIRMAN BRENNAN: And I also agree with you
24 that in terms of the right to conduct a survey of local
25 stations, that ought to be part of our structure in terms

1 of our terms, rather than be a matter of good faith
2 between ASCAP and Public Broadcasting. Any further
3 discussion on that issue?

4 COMMISSIONER JAMES: We don't have a
5 consensus on this; do we?

6 CHAIRMAN BRENNAN: Well, you will notice that
7 the Chairman has been very careful when there's a
8 different opinion to refrain from--but if you want to
9 pronounce the benediction--. (laughing.)

10 Well, we've been giving attention to
11 Public Broadcasting and National Public Radio now for
12 several hours. And let us shift our attention somewhat
13 to the intercollegiate network and the approximately 200
14 stations which we are told are not affiliated either with
15 National Public Radio or with the intercollegiate network.

16 And perhaps the first issue to be considered--
17 and of course, we're talking now only about stations which
18 have not entered into voluntary agreements.

19 Commissioner Coulter has called to my attention
20 the desirability of considering another subject, and
21 logically I think my colleague as well is correct, this
22 would be a useful time to take that up. And that is to
23 consider what weight should be given to the testimony in
24 this proceeding and in proceedings of other public bodies
25 concerning expenditures by Public Broadcasting, and also

1 the matter of the auditing of Public Broadcasting
2 expenditures by the General Accounting Office. And I would
3 invite any of my colleagues who wish to comment on those
4 issues to do so at this time. Commissioner Coulter?

5 COMMISSIONER COULTER: My feeling on that is
6 that that should probably be given about the same
7 attention as the letter from All Industries group. But
8 also I think that is an issue entirely unrelated to
9 determining what a fair evaluation of the ASCAP repertoire
10 is in the context of Public Broadcasting.

11 COMMISSIONER GARCIA: Mr. Chairman?

12 CHAIRMAN BRENNAN: Commissioner Garcia.

13 COMMISSIONER GARCIA: If we're going to
14 adopt the attitude that was mentioned today, that we're
15 really more interested in Public Broadcasting's ability
16 to pay, then I agree with Commissioner Coulter in saying
17 that we should give little weight to these proceedings
18 because we're interested in their ability to pay and not what
19 their expenditures are, or in establishing a reasonable fee.

20 CHAIRMAN BRENNAN: Any further discussion?

21 COMMISSIONER JAMES: Yes, I think I understand
22 what Commissioner Garcia is saying. I agree with
23 Commissioner Coulter 100 percent; it has as much weight as
24 All Industry. And think we have a consensus on that.

25 CHAIRMAN BRENNAN: That also suggests why the

1 Chairman, at the start of this proceeding, indicated that
2 he would not attempt today to segment admissible portions
3 of the ASCAP proposed hearing reply statement, because I
4 believe that most of the items to which Mr. Latman objected
5 came within this particular category.

6 We'll go back now to where I was a few moments
7 ago, considering the stations which are either part of
8 the intercollegiate broadcasting network or the 200 unaf-
9 filiated broadcasting entities. And the question arises
10 as to whether we should have one rate structure, which
11 would apply to the intercollegiate stations and a different
12 structure, applying to the remaining unaffiliated stations,
13 or that we should simply adopt one structure, applying to
14 all stations other than those which are part of National
15 Public Radio. What is the pleasure of my colleagues?

16 COMMISSIONER JAMES: I'd like to have two
17 schedules. I place intercollegiate in a different type
18 of provision than I do anyone else. And I think it's
19 within our statutory jurisdiction to establish that.

20 COMMISSIONER COULTER: If at all possible, I
21 would like to be able to adopt something that would
22 include the unaffiliated non-commercial stations in the
23 same rate that we're establishing.

24 CHAIRMAN BRENNAN: The same rate as for the
25 National Public Radio?

1 COMMISSIONER COULTER: Yes, if possible.

2 CHAIRMAN BRENNAN: But you would not put the
3 intercollegiate stations in that?

4 COMMISSIONER COULTER: No, I would refer to
5 Commissioner James' opinion in that area.

6 CHAIRMAN BRENNAN: Could Commissioner Burg
7 comment for my benefit as to whether or not her proposal
8 was to be limited to the National Public Radio stations
9 or did you see some merit in applying that across the board?

10 COMMISSIONER BURG: I have considered the
11 possibility of applying it across the board, but that's
12 all I can tell you. Foremost and primary I am looking at
13 it in terms of public broadcasting. But my answer to
14 your most recent question is--I mean the other question
15 on the table--is that they should not all be considered
16 programs under one license. And you may come up with two
17 or three variations, maybe four. But there is that
18 definite possibility. And until you establish one and look
19 at what it is, I don't think you can take the next step.

20 CHAIRMAN BRENNAN: Any further comment?

21 COMMISSIONER JAMES: Just a legal question that
22 I can't resolve in my own mind. Can we, by terms and
23 et cetera, grant an exemption?

24 CHAIRMAN BRENNAN: A total exemption?

25 COMMISSIONER JAMES: Total exemption.

28

1 CHAIRMAN BRENNAN: It's a very interesting
2 question. And it's one I've given some thought to in terms
3 of the below ten watt stations in particular. And I'll
4 just venture a tentative reaction. I think the intent
5 of Congress was that copyright owners were to receive
6 reasonable compensation for the use of their material.
7 And the only argument that you might be able to offer to
8 justify a total exemption for very small stations would be
9 that these copyright owners are being adequately compensated
10 for the use of their materials by larger public broadcasting
11 entities, and that it was a reasonable disposition on
12 our part to totally exempt them. But I'm a firm believer,
13 Commissioner, in everybody paying something.

14 Senator McClullen, when I was involved with him
15 for a number of years with the cable television fee
16 schedule, had to deal with a similar problem. And as a
17 matter of fact, certain of the copyright owners were
18 prepared to totally exempt certain mom and pop cable systems
19 because they thought from the political point of view it
20 was better to placate the small cable operators, and then
21 be in a stronger position to do battle with the larger
22 systems in the Congress. And Senator McClullen and I
23 agreed and felt very strongly that everybody ought to
24 make at least a token payment.

25 And I would be inclined to favor that. But

1 your question to me, you asked if the legal argument could
2 be made. I think it could be put on the policy question,
3 I would not favor any type of exemption.

4 We'll take a five-minute recess.

5 (A short recess was taken.)

6 CHAIRMAN BRENNAN: This is the one portion of
7 this discussion where we have to give at least some
8 consideration to the BMI catalog. The general counsel
9 of BMI had informed me in a telephone conversation that
10 BMI has not entered into any voluntary agreements with the
11 200 odd Public Broadcasting entities that are not
12 affiliated either with National Public Radio or with the
13 Intercollegiate Network.

14 So, in these next few issues we have to also
15 consider the possible application of these problems to the
16 BMI catalog.

17 COMMISSIONER BURG: Did you say non-public
18 broadcasting entities or--

19 CHAIRMAN BRENNAN: The non-national public
20 radio or non-intercollegiate. And according to the
21 information in our records, there are about 200 such
22 broadcasting entities.

23 Before the recess the general consensus seemed
24 to be that we probably ought to have two or three, possibly
25 more, breakdowns of our fee schedule. Focusing now on the

1 application to the intercollegiate stations in terms
2 of ASCAP across the board and SESAC above 20 watts, and
3 the 200 unaffiliated stations, would our disposition be to
4 have a blanket license with regard to ASCAP, BMI and SESAC;
5 and a per composition or per use formulation with regard
6 to the Italian Book Company and the unaffiliated copyright
7 owners.

8 I think that would follow more or less what
9 we had resolved earlier in the day, unless somebody
10 disagrees.

11 COMMISSIONER JAMES: I agree.

12 CHAIRMAN BRENNAN: Concerning the SESAC
13 proposed license, SESAC has requested that in our action with
14 regard to the above 20 watt stations that have not entered
15 into a voluntary agreement with SESAC, that we follow
16 the formulation set forth in the SESAC licenses for those
17 stations.

18 Counsel for SESAC has informed the Chairman
19 that as of a few days ago, some 60 of these unaffiliated
20 stations have entered into voluntary agreements with SESAC.
21 The president of the Intercollegiate Broadcasting Network
22 has informed the Chairman in a telephone conversation that
23 we should give no weight to these 60 agreements because
24 in his judgement, many of the agreements were entered into
25 before the stations were aware of their rights before this

1 body.

2 I have no particular point of view concerning
3 the SESAC proposal. But I think that we must adopt a
4 consistent formulation, and that we really cannot give
5 any separate treatment to the SESAC proposal. It's not
6 generally in accord with the balance of the structure.

7 COMMISSIONER JAMES: I agree 100 percent.

8 CHAIRMAN BRENNAN: Does that meet with
9 general approval?

10 COMMISSIONER JAMES: 100 percent.

11 CHAIRMAN BRENNAN: I think this is perhaps
12 the last question then on performing fees with regard to
13 musical works. And it's the question of record-keeping
14 by local Public Broadcasting entities in terms of the
15 unaffiliated copyright owners. And while it might present
16 a small burden on Public Broadcasting, my view would be
17 that we ought to apply the same general record-keeping
18 obligations and notice requirements to these stations for
19 these owners, as we do with the ASCAP approach.

20 COMMISSIONER JAMES: I agree.

21 CHAIRMAN BRENNAN: We turn now to the application
22 of the Harry Fox agreement to the disposition of the
23 recording rights issue. As Mr. Leonard Feist testified
24 during these proceedings, a number of musical publishers are
25 not parties to the Harry Fox agreement. And we must

1 consequently make some provision with regard to those
2 publishers.

3 Unlike the Performing Rights agreements, in
4 terms of recording rights to the extent that the provisions
5 of those agreements are within our jurisdiction, I believe
6 they do give us useful guidance as to what we should do,
7 and specifically in terms of general fee schedule provided
8 in those agreements.

9 As was indicated during the testimony, there
10 may be areas where something is included in a voluntary
11 agreement which we cannot adopt because it is beyond our
12 jurisdiction. I also note that in the proposal of
13 Public Broadcasting there are certain clauses which I feel
14 go beyond the extent of our jurisdiction.

15 But with those disclaimers and qualifications
16 I tend to think that the Harry Fox agreement provides good
17 benchmarks for our disposition of this issue. Is there any
18 discussion on that?

19 COMMISSIONER BURG: Are you saying that we should
20 be guided by it, but not limited to it necessarily; is
21 that correct?

22 CHAIRMAN BRENNAN: I think that's a fair state-
23 ment.

24 COMMISSIONER BURG: I agree.

25 COMMISSIONER JAMES: I agree too.

1 CHAIRMAN BRENNAN: We'll now turn to the
2 consideration of pictorial, graphic and sculptural works.
3 One of the most important issues in that area is what
4 treatment we give to the use of such works by local
5 Public Broadcasting entities.

6 The testimony by the representatives of the
7 Visual Artists emphasize the frequency of the use of such
8 works by local Public Broadcasting entities; and also
9 called our attention to the requirement of the statute,
10 that such copyright owners be compensated, and that they
11 be given notice of the use of their works.

12 Therefore, my general disposition is that in
13 formulating our fee schedule for the use of visual works,
14 that we must make provision for payments for uses by local
15 stations and that we also must establish regulations which
16 would place a reasonable burden on Public Broadcasting
17 to advise the copyright owners of the use of their works.
18 Is there any discussion of these issues?

19 COMMISSIONER JAMES: I agree, Mr. Chairman.

20 COMMISSIONER BURG: Yes, I agree to that.

21 CHAIRMAN BRENNAN: In the musical field we
22 deal with several Performing Rights licensing societies.
23 The presentations by the representatives of the creators
24 of Visual Works indicate that, as Public Broadcasting has
25 long contended, no similar structure exists for the

1 clearance and licensing of such works. A coalition has
2 been formulated to represent the owners of visual works.
3 And the question arises as to whether or not this body
4 can adopt some type of a blanket license with regard
5 to certain of these associations. I have not made a
6 careful examination of the structure of these bodies or
7 their jurisdiction.

8 But a cursory examination of this record would
9 lead me to the conclusion that we probably cannot
10 utilize a blanket license approach with regard to visual
11 work. Is there any discussion on this issue?

12 COMMISSIONER BURG: I have a question on it.
13 Do we have any kind of status report as to what the
14 progress has been vis-a-vis voluntary agreements?

15 CHAIRMAN BRENNAN: The Chair has not received
16 any further communication from Public Broadcasting or
17 the several visual arts groups since the conclusion of
18 our hearings. If there's anybody present who would care
19 to respond to the Commissioner's question, I would be
20 glad to recognize such person. Mr. Aleinikoff.

21 MR. ALEINIKOFF: I think that the best answer
22 I can give you is that we have been in contact since our
23 hearing. We have reached no further agreement.

24 COMMISSIONER BURG: Thank you.

25 COMMISSIONER JAMES: Mr. Chairman, I think I

1 agree with you. I think it's clear in the documentation
2 submitted by the Coalition that their preamble was that:
3 we're so loosely knit, so that a blanket is just about
4 impossible. So, I agree with you.

5 CHAIRMAN BRENNAN: Fine. Another issue is
6 whether or not the rates and terms of our regulations must
7 be limited to domestic uses. This Commissioner feels
8 it must be so limited. Does any Commissioner disagree?

9 COMMISSIONER GARCIA: I agree.

10 COMMISSIONER JAMES: I agree.

11 CHAIRMAN BRENNAN: We have not made a
12 consensus, but unanimous agreement.

13 Must the reproduction of visual works for
14 audio-visual educational purposes be limited to the
15 seven-day period provided in Section 118d3? This
16 Commissioner answers the question in the affirmative. Any
17 further discussion?

18 (No verbal response.)

19 CHAIRMAN BRENNAN: I think a clear consensus
20 agrees on that point.

21 Commissioner Burg suggested to me a few minutes
22 ago that we might possibly want to discuss a little bit
23 more the question of record-keeping and possibly in terms
24 of the filing of cue sheets or reports of uses in the
25 offices of this agency.

1 I have no particular proposal to advance at
2 this time. But I would be interested if any of my
3 colleagues had any view as to the desirability of, in
4 certain portions of our regulations, we would require the
5 filings of certain documents with us--cue sheets perhaps
6 with regard to certain aspects of musical works, and reports
7 of uses with regard to visual works. Are there any
8 discussions on these issues?

9 COMMISSIONER COULTER: Before I even form an
10 opinion on the issue, I'd like to ask the representative
11 of copyright owners in this case whether they would like
12 it centralized with us.

13 CHAIRMAN BRENNAN: Unfortunately, Commissioner,
14 looking around the room, the representatives who are
15 present are really not that directly concerned with this
16 issue. We are interested now, to some extent, with the
17 views of the National Music Publishers Association and
18 perhaps even more importantly, with the representatives
19 of the Visual Artists.

20 Let me see if the Chair, who is getting more
21 ancient by the year, can recall what the testimony was.
22 And I'll exercise the option of editing the testimony if
23 my memory fails me. My recollection was that Mr. Leonard
24 Feist, in the testimony of the National Music Publishers
25 Association, did recommend, Commissioner, that we require

1 the filing of cue sheets with regard to recording rights.

2 COMMISSIONER COULTER: With us?

3 CHAIRMAN BRENNAN: With us. And I am also
4 reasonably confident that one or more of the filings by
5 the representatives of the visual artists recommended that
6 we adopt regulations that would require Public Broadcasting
7 to file certain reports.

8 And I would make this request, speaking for
9 one Commissioner, that I think a consensus has clearly
10 developed here that this body is concerned that all copy-
11 right owners be fairly compensated, and that the requirements
12 of the statute be observed with respect to providing notice
13 of the use of such works. To some extent, these problems
14 are obviated when blanket licenses exists. But clearly
15 there are areas where it's going to require some
16 administrative activity by Public Broadcasting. And I think
17 it would behoove the representatives of Public Broadcasting,
18 at the earliest feasible date, to possibly suggest to us
19 some ideas as to how our objective can be implemented with
20 the least burden on Public Broadcasting.

21 My interpretation of the disposition of this
22 body is that we are not disposed toward a formulation that
23 would result in certain copyright owners not being
24 compensated or not considering uses by local broadcasting
25 facilities. And rather than for this body to adopt

1 requirements that might prove to be very burdensome to
2 Public Broadcasting, if PBS and NPR and the Intercollegiate
3 Network, where appropriate, have suggestions to offer, I
4 think they would receive very serious consideration by this
5 body.

6 COMMISSIONER BURG: Mr. Chairman, I have
7 a question related to your other question.

8 COMMISSIONER JAMES: You went into another
9 area there.

10 COMMISSIONER BURG: I've almost forgotten
11 what it was.

12 COMMISSIONER JAMES: It was the deposit of
13 cue sheets and things like that.

14 COMMISSIONER BURG: Yeah, record-keeping.
15 What's the alternative to keeping in our offices,
16 and is this contingent on us finding additional or new
17 space? What is the alternative is really the question.

18 CHAIRMAN BRENNAN: As far as the visual works
19 are concerned, I think that one of the alternatives would
20 be to require the Public Broadcasting entity to notify
21 these national associations that exist now, and perhaps
22 will be created in the future, as to what uses may be made.
23 As to the recording rights, I suppose that another alterna-
24 tive would be simply to require the broadcasting entity
25 to notify the copyright owner, who, in fact, could almost

1 certainly be identified on the music that was being used
2 at the time of the recording.

3 Mr. Feist, either in his testimony or in his
4 statement, indicated that Harry Fox office would be prepared
5 to assist Public Broadcasting in identifying the location
6 of such copyright owners. So, it's not clear that there is
7 a public need for this being done by filings with the
8 CRT. But I think the consensus here is that there has to
9 be some requirements, some regulations established.

10 MR. ALEINIKOFF: I'm being mindful of the
11 warning of the Chair a couple of minutes ago about what kind
12 of supportive mechanisms may be imposed. In the first
13 place, I do want to point out that in our proposed license
14 for pictorial works there was a large paragraph on
15 exactly this problem, of what we thought would give
16 adequate notice to copyright owners of pictorial, sculptural
17 and graphic materials that we use in our national programs.
18 So that there was a mechanism set up with publication and
19 availability of lists of uses, that would be available to
20 anybody who is interested.

21 Whether it was here at the Tribunal or the
22 the newspapers, that's again for you to decide. But we
23 have no objection. On the Harry Fox side, on the music
24 side, we did not include any such proposal simply because
25 it was our assumption that copyright owners of the music

1 are knowledgeable, are aware. I mean, you know what the
2 copyright notice is. I have not seen very many musical
3 pieces where you don't know who can control the rights.
4 Therefore, we did not feel it was necessary; we simply
5 provided for a payment. And to me, the payment does
6 include notice of use, because you can't make a payment
7 without notice. So, I'm not quite clear what further
8 proposals we can make in either regard, except for the
9 ones we have already made, which we do think are
10 adequate in terms of the notification of uses of payment.
11 If the Chairman feels that we are too limiting in the
12 programs that we're applying it to, that's a different
13 question than the question of notice of mechanisms.

14 CHAIRMAN BRENNAN: Thank you, Mr. Aleinikoff
15 for that observation. But I would make the additional
16 comment that both the representatives of the visual
17 artists and the National Music Publishers Association felt
18 that the proposals made up to this point by Public Broad-
19 casting are not adequate.

20 And all the Chair is doing is cautioning
21 Public Broadcasting that this body might well be persuaded
22 that these observations are sound and would go beyond
23 what you currently had recommended. And I'd want to give
24 Public Broadcasting the opportunity to reflect on this, and
25 to see whether or not you could come up with something that

1 would be responsive to some of the concerns which have
2 been expressed in these various proposals.

3 MR. ALEINIKOFF: We will be glad to.

4 CHAIRMAN BRENNAN: Thank you. Another question
5 that arises is assuming that either by action of Public
6 Broadcasting or the regulations of this agency, every
7 reasonable effort has been made to locate a copyright owner
8 whose work has been used. And after the expiration of
9 an appropriate period of time, that copyright owner has
10 not been located, what disposition shall be made of the
11 royalty fee that would be due to persons in that category.

12 Mr. Bressler, in his testimony, I'm sure that
13 was also the point of view of the Coalition, indicated
14 that in no event should the funds escheat either back to
15 Public Broadcasting or elsewhere to the Treasury, but that
16 some fund ought to be established whereby the funds would
17 be utilized to advance the arts.

18 My initial reaction was that the amount of
19 money that we're talking about would be so small that
20 it would not make much of a contribution to the growth of
21 the arts. But I would welcome any comments which
22 Commissioners may care to make on this issue. Commissioner
23 Burg?

24 COMMISSIONER BURG: In addition to the
25 question itself, I agree that I think the amount of money

1 won't be substantial. But whatever it is, there is that
2 money sitting someplace. So, what you really need--if it
3 doesn't revert back to Public Broadcasting or go to the
4 Treasury, you need some of mechanism for allocation. Now,
5 who and what sets up--I mean, this asks more questions in
6 my mind than it answers. And I'm very unsure of how to
7 proceed on it. And if the money should be something more
8 than a modicum, you have a problem. You've got other
9 people, obviously, that are going to have to brought into
10 it and a disposition made. And I don't know if that's in
11 our jurisdiction or not quite frankly.

12 COMMISSIONER JAMES: My suggestion is that after
13 Public Broadcasting has run out trying to find these
14 copyright owners, that they deposit it with us, we put
15 it in--just like we do our segregated account. And then
16 after the statutory period of time, it escheats to the
17 U.S. Government. I think it's seven years; isn't it?

18 COMMISSIONER GARCIA: Yes.

19 CHAIRMAN BRENNAN: But you would not, in any
20 case, utilize these funds for purposes of advancing the
21 arts. It would be essentially a bookkeeping--

22 COMMISSIONER JAMES: Yes, a bookkeeping problem.
23 Just recycle it; send it back to the U.S. Treasury and
24 let them give it back again to Public Broadcasting.

25 CHAIRMAN BRENNAN: Another question that arises

1 with regard to visual works is whether or not the fee
2 structure should be in some fashion linked to the number
3 of uses of the work during a specified period of time.
4 And Commissioners will recall that the statement submitted
5 to us by at least certain of the representatives of the
6 visual arts suggests that there ought to be a basic fee
7 which would allow for possibly three uses of the work during
8 a period of time and an additional fee for uses beyond
9 that number. Does this concept have any attraction to
10 Commissioners?

11 COMMISSIONER COULTER: You're making a
12 distinction between the number of uses and the duration
13 of the use, because that was a point of dispute.

14 CHAIRMAN BRENNAN: The duration?

15 COMMISSIONER COULTER: Yeah, how long, whether
16 it was two seconds or less.

17 CHAIRMAN BRENNAN: Yes.

18 COMMISSIONER JAMES: The issue now is
19 whether or not we shall establish a per use quantity,
20 like if the Boston station does a show and it has a picture
21 and they make three copies of it and those copies go out
22 and the copies are made, that each copy would subsequently
23 become a use. Is that what the issue is right now? I
24 think they ought to pay for every copy. If they don't want
25 to pay or can't pay, then don't use that particular work.

1 Or they have another alternative, because this compulsory
2 license does not destroy the inherent contractual right
3 that they would have with that particular artist to
4 independently contract for a more reasonable rate. So, I'm
5 very strongly inclined, I think, that if they use it
6 and it's multiplied infinitesimal, shown infinitesimal,
7 that each time they should pay.

8 CHAIRMAN BRENNAN: Any further comment on
9 this issue?

10 COMMISSIONER BURG: What about the time fix?

11 COMMISSIONER JAMES: Doesn't make any
12 difference. You mean my situation?

13 COMMISSIONER BURG: No, I'm referring back to
14 what Tom was saying.

15 CHAIRMAN BRENNAN: You're asking me the
16 question that was raised during the hearing as to fair use.
17 I do not think it's the function of this body to define
18 fair use. But possibly others might regard that as being
19 useful activity.

20 COMMISSIONER BURG: Well, there were some
21 strong opinions on it both ways, as I recall. In fact,
22 the visual, you know, whether it's for two seconds or one-
23 tenth of a second--

24 COMMISSIONER JAMES: You mean the time?

25 COMMISSIONER BURG: The time.

1 COMMISSIONER JAMES: Well, they pay. If it's
2 that quick--they pay.

3 COMMISSIONER BURG: You're talking about
4 visuals now?

5 COMMISSIONER JAMES: Yeah.

6 CHAIRMAN BRENNAN: But the statute clearly
7 exempts fair use. And I don't think it's for us to
8 undertake to formulate a definition of fair use. But I
9 could see how that would be helpful to people.

10 COMMISSIONER JAMES: Yes. My position is that
11 I think any use, regardless of how long in duration and
12 how frequently used constitutes a use, and every such
13 use has to be compensated for.

14 COMMISSIONER BURG: You mean in the photo
15 montage in the background?

16 COMMISSIONER JAMES: Don't put it up there.
17 The option ultimately is for that producer or director.

18 CHAIRMAN BRENNAN: We have several related
19 questions which deal with proposals of one or more of the
20 Visual Artists Association in which they ask us to, in
21 the portion of our decision relating to terms, to place
22 certain restrictions on the use of works. We have, for
23 example, the proposal of the Coalition which would ask us
24 to exclude so-called thematic uses.

25 And we have the proposal of the cartoonists,

1 which would ask us to establish limitations against
2 simultaneous use for published work, a cartoon, for
3 example, in the newspaper, and on Public Broadcasting
4 during a two or three day period. And also we have the
5 general proposal asking us to adopt a regulation somewhat
6 akin to the moral rights of an author, whereby the work
7 would be protected against distortion by the user.

8 This Commissioner, earlier in the proceeding,
9 indicated in regard to certain clauses that were
10 proposed with regard to the music licenses, that I felt
11 that what was being proposed in those areas were not
12 within our jurisdiction. I am more openminded on certain
13 of these suggestions. I think possibly some version of
14 them might reasonably qualify as coming within terms of
15 use, which we are authorized to impose. But I think we
16 cannot go too far in this area without going beyond our
17 jurisdiction under the statute.

18 Are there any comments from Commissioners?

19 COMMISSIONER COULTER: Yes.

20 CHAIRMAN BRENNAN: Commissioner Coulter.

21 COMMISSIONER COULTER: I would like to avoid
22 getting into these questions too deeply because there are
23 going to be very simple, practical questions that they're
24 going--the question of usage here, I don't think is that
25 frequent. And the argument presented is based frequently,

1 or seem to be, on hypothetical assumptions of their
2 use by local stations. And until that is verified, I'm
3 not sure that we need to resolve these details.

4 COMMISSIONER JAMES: Well, you have actually
5 three issues; distortion is included in that, was it not?

6 CHAIRMAN BRENNAN: Yes, I lumped them,
7 Commissioner, because they all raised generally first
8 the question about whether it was appropriate for us to
9 carve these limitations out.

10 COMMISSIONER JAMES: I was trying to understand
11 Commissioner Coulter's comment. Are you saying that they
12 should have the right to distort this thing, that we
13 shouldn't go into it?

14 COMMISSIONER COULTER: You're asking me?

15 COMMISSIONER JAMES: Yeah.

16 COMMISSIONER COULTER: I think I would
17 prefer to avoid getting into these questions now, of our
18 regulating these questions now because the concern of the
19 people that are asking us to do it is based on usage by
20 local stations that they haven't verified exists yet.
21 They said they think--the cartoonists and--

22 COMMISSIONER JAMES: Would you restate your
23 comment again, or we could have the --

24 CHAIRMAN BRENNAN: My comment, I made reference
25 to what I said earlier in the day with regard to musical

1 works, I felt that some of the proposals made really
2 were not within our jurisdiction, that the statute
3 granted a compulsory license to the users to make use of
4 musical works. And we all agreed that certain matters
5 did not come within our jurisdiction.

6 As to these several issues collectively, I am
7 not as convinced one way or the other. I could conceive
8 that I could, for some version of certain of these
9 proposals, as being legitimate exercise of our right to
10 establish reasonable terms. As to the matter of distortion,
11 I suppose if it was carried too far, you could almost
12 say that we could adopt a regulation with regard to
13 musical works which would prevent a Public Broadcasting
14 entity from performing rendition of a Rogers and Hammerstein
15 composition in a fashion that would be objectionable to
16 the composer or the state.

17 COMMISSIONER JAMES: Subject to amplification,
18 I agree with your comment.

19 CHAIRMAN BRENNAN: Getting back to money.
20 At the hearing on pictorial, graphic and visual works all
21 the parties who appeared made comment about the posity
22 of data available concerning the fees that would be appro-
23 priate for these uses.

24 In the supplementary post-hearing statement
25 of PBS there is an appendix which gives us certain data

1 concerning fees that were paid for visual uses during a
2 period of time. And I'd like to ask one of the
3 representatives of Public Broadcasting if the data contained
4 in the appendix is a complete account of the responses
5 that were received by Public Broadcasting, or was this a
6 selected description of those uses.

7 MR. SMITH: That is a complete account of
8 responses that we got insofar as some people responded
9 on film strips and other material which wasn't--

10 CHAIRMAN BRENNAN: That were not relevant?

11 MR. SMITH: Yes, yes.

12 CHAIRMAN BRENNAN: But with regard to those
13 that were relevant, this is complete?

14 MR. SMITH: (Nodding affirmatively.)

15 CHAIRMAN BRENNAN: Thank you, Mr. Smith.

16 MR. ALEINIKOFF: It's the complete answers
17 to our inquiry. We don't know how many stations did not
18 answer or--it's not a complete record of what happened
19 perhaps, but it's--

20 CHAIRMAN BRENNAN: I was just trying to get
21 the record clear that where it was relevant, anything that
22 was relevant that you received, you made available to the
23 Tribunal.

24 Perhaps I could venture a consensus on this
25 one, that Commissioners feel that we're probably no further

1 advanced--or a little further advanced than we were at
2 the time of the earlier hearing, and possibly this might
3 be one area where this Commissioner might be willing to
4 put some language into our decision saying that we're not
5 intending to establish any precedence for the future.

6 Does anybody want to talk about fee schedule
7 at this point?

8 (No verbal response.)

9 CHAIRMAN BRENNAN: I think not. We go on to
10 another question which concerns what brought us here
11 in the first place, namely the action of the Congress
12 in enacting a compulsory license for certain uses of certain
13 copyrighted works.

14 A strong reason for the Congress establishing
15 the compulsory license were the concerns expressed by
16 Public Broadcasting that particularly in the visual area
17 there did not exist licensing agencies with whom they could
18 deal. There was also some concern about money issues, but
19 I think it's fair to say that the question of clearance was
20 a very strong factor in the action taken by the Congress
21 in enacting the compulsory license.

22 I don't think anything has changed from the day
23 Congress passed the act until today. But I think conditions
24 could be somewhat different come 1983. And I would suggest
25 that as part of our determination in this proceeding, that

1 the body agree that on or about March 1st of 1980, or
2 possibly a little later in 1980, that we would study whether
3 or not there was still a need for a statutory compulsory
4 license. And after proper procedure, including hearings,
5 to make our recommendations to the Congress sufficiently
6 in advance of the 1982 review process so that the Congress--
7 if they were so disposed, and if we had so recommended--
8 could consider whether or not there was a further need for
9 the compulsory license.

10 I'm not suggesting today a particular proposal
11 in terms of when this report should be submitted to the
12 Congress or whether we should act on it. But I would
13 like to recommend this procedure to the Commissioners and
14 to invite their comments on it, if they so desire.

15 COMMISSIONER COULTER: I would like to
16 withhold judgement.

17 COMMISSIONER BURG: You're talking about
18 reviewing this in two years?

19 CHAIRMAN BRENNAN: The statute does not
20 authorize us to reopen the rate issue. But what I am
21 suggesting is that in approximately two years from now,
22 we review the general situation and explore whether or not
23 there is a further need for the compulsory license, or
24 whether the market place and the voluntary sector can
25 operate after 1982.

1 COMMISSIONER BURG: I guess--I don't know
2 if two years is going to give us enough benchmark. But
3 I will reserve judgement on that also.

4 CHAIRMAN BRENNAN: Any further discussion?

5 COMMISSIONER GARCIA: Mr. Chairman, I think
6 it's a very, very interesting concept. And I would
7 definitely be in favor of it. I guess I'm endorsing the
8 recommendation.

9 CHAIRMAN BRENNAN: The Chairman has sort of
10 dominated this proceeding by asking questions of his
11 colleagues. And I want this to be a very democratic--
12 that's a small "d"--body. And if Commissioners have
13 additional matters they wish to raise now, I shall be
14 glad to recognize Commissioners.

15 (No verbal response.)

16 CHAIRMAN BRENNAN: If not, I think we've had
17 a very productive today; we've covered a good deal of
18 ground. And we shall recess at the call of the Chair.
19 The meeting is recessed.

20 (The meeting was recessed at the call of the
21 Chair at 4 o'clock, p.m.)